



ASU Additional Submission

Education and Employment Legislation Committee
Senate Inquiry
Parliament of Australia

Building and Construction Industry (Improving Productivity) Bill 2013 [No.2] and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [No.2]

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ABCC Additional Submissions re ABCC Bills

Introduction

The ASU has previously made a submission to the Education and Employment Committee Senate Inquiry regarding the Building Construction Industry (Improving Productivity) Bill 2013 [No 2] and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [No 2] on 19 February 2016, which sets out specific concerns from the ASU and supports the ACTU position regarding the ABCC.

To this end, the ASU references its earlier submission, and provides this document as an addendum to the contents of that submission. The intention of this document is to provide further guidance on the ASU Submission of 19 February 2016, and can be read in conjunction to that document. For the purposes of clarity, this submission focuses specifically upon providing comments about the Building Construction Industry (Improving Productivity) Bill 2013 [No 2], however this is not to say that there are not a wider range of considerations that need to be addressed with regard to the Construction Industry (Consequential and Transitional Provisions) Bill 2013 [No 2]. Accordingly, any reference to 'the Bill' within this submission should be taken to be in reference to the Building Construction Industry (Improving Productivity) Bill 2013 [No 2], unless otherwise stated. In the alternative, the Construction Industry (Consequential and Transitional Provisions) Bill 2013 [No 2] shall be referred to as the 'Transitional Provisions' Bill.

The ASU also notes the combined submission tendered on 19 February 2016, by the Australian Manufacturing Workers Union, the Australian Workers Union, the Construction, Forestry, Mining and Energy Union, and the Transport Workers Union of Australia, and herein records its support for the propositions contained within that submission.

The ASU has also had the opportunity to review the submissions filed by the Law Council of Australia on 19 February 2016. In this regard, the ASU supports a number of contentions made by the Law Council of Australia, particularly concerning the argument that the Bill is contrary to Australia's human rights obligations pertaining to the right to freedom of association; the right to form and join trade unions; the right to freedom of assembly; the right to freedom of expression and the right to privacy.¹ It is the view of the ASU that such assertions have been advanced in manner that provides justification for the rejection of the Bills.

It cannot be agreed that the proposed legislation will address the alleged corruption and poor behaviour within the building and construction industry. Rather, there are unintended and problematic consequences which will flow from the introduction of the Bills in their present form. In this regard, the ASU supports the assertion made out within the combined submission filed by the AMWU, AWU, CFMEU and TWU that the Bills focus squarely upon regulating industrial relations and industrial rights.² The ASU further agrees with the additional contention that criminal matters can be

¹ Law Council of Australia 'Re-establishment of the Australian Building Commission and Construction Commission', submission to the Senate Education and Economics Legislation Committee, 19 February 2016, [16]

² Senate Education and Employment Legislation Committee, *Building and Construction Industry (Improving Productivity) Bill 2013* and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013*, submission by the Australian Manufacturing Workers Union, Australian Workers Union,

appropriately dealt with by Australian criminal law and the criminal law enforcement agencies, particularly given the existing FWBC has the authority to refer instances of alleged criminal behaviour to police and/or law enforcement agencies.³

The ASU takes this opportunity to record its continued opposition to the Bills, given the inability of such Bills to provide adequate checks and balances upon coercive powers, the problematic nature of the proposed laws aimed at dealing with unlawful industrial action and unenforceable agreements, and the intention to issue higher civil penalties for those who breach industrial laws.

Explanatory commentary

By way of background, as outlined in its first submission of 19 February 2016, the ASU covers employees working in the local government sector across the country. Local government provides a wide variety of services to its constituents, and as a result employees working in the local government industry are engaged in a vast number of different roles. The ASU covers approximately 120,000 members across Australia, by virtue of its local government, energy and water coverage. Many of those members reside in regional and rural areas, as well as in metropolitan areas.

Uncertainty within the proposed legislation

The ASU remains concerned that there is still insufficient clarity upon the proposed coverage of the Bill. In particular, the following matters remain the subject of concern:

- (a) Will local government employees engaged in municipal construction work, which is financed, in whole or in part, by Federal funding be required to comply with the Building Code?
- (b) If the answer to the above question is yes, will Local Government employees who are *not* directly engaged in municipal construction be required to comply with the Building Code?

Other questions that remain unanswered include whether the ABCC will cover some, or all, of ASU members working in the local government, energy and water industries. The conclusion the Union draws is that the laws are intentionally ambiguous. The ASU sees this as a primary threat because it may well allow employers to change conditions and wages, and impact upon the Union's ability to defend workplace rights.

It's the whole of business approach that may flow on to librarians, council art gallery staff, community and child care servicing, town planners, sport and recreation officers, beach inspectors and all the other service areas that are captured by local government Awards and Agreements.

It is the ASU's view that clarification of these questions is necessary in order to fully comprehend the scope of the proposed legislation.

Local government, energy and water sector employees should be concerned that they could be dragged before an ABCC inquiry⁴, into closed hearings, where they might even be gagged from speaking further about it, even to their advocate, the ASU. The ASU is gravely concerned that the ABCC could enact power for an inspectorate to secretly interrogate an employee, confiscate items

Construction, Forestry, Mining and Energy Union and the Transport Workers Union of Australia, 19 February 2016, [5].

³ Ibid., [5].

⁴ Building and Construction Industry (Improving Productivity) Bill 2013 [No 2] (Cth), cl 61 (1).

such as private mobile phones, or even jail people for up to six months, for refusing to participate in their inquiries.⁵

More specifically, the ASU does not accept that section 6, subsections 4 and 5 are specifically clear. In our view, it is not certain what subsections 4 and 5 actually mean, in the context of the proposed legislation. This is because subsection 4 states that “*subject to subsection (5), building work includes any activity that is prescribed by the rules for the purposes of this subsection*”. Notably, subsection 5 provides that “*building work does not include any activity that is prescribed by the rules for the purposes of this subsection*”. The ASU believes that the definition of ‘building work’ is unnecessarily broad, and a more specific meaning would greatly assist in facilitating understanding and application of the Bill.

As already indicated, a large proportion of ASU members are employed in publicly owned and operated water industries either by State owned corporations or local government entities, local government direct employees as well as employees in the electricity distribution generation and transmission industries who provide not only construction activities in these three areas for their principal employers but also provide additional works for private sector and/or other business enterprises including the Federal government by way of contestable works or expressions of work as provided as a last resort.

With respect to section 9, which relevantly provides that “a site is an **ancillary site** if the site is:

- a) a site from which goods are transported or supplied, or building industry participants are transported, directly to a building site; or
- b) a site where a building industry participant, who is performing building work, or managing building work that is being performed, on a building site, does work relating to the building work”.

This broad description of ancillary site could support why Local Government supply of material, parts or logistics may be encapsulated in federally funded projects.

In response to the issue of the Building Code, the ASU places particular emphasis upon its concerns regarding the ability of the Minister to issue the Building Code, in accordance with section 34 of the proposed legislation. Similarly, the ASU is opposed to the contents of section 35 of the Bill. Upon our reading, this section is highly problematic. The Building code provides all the detail regarding coverage of the legislation and the compliance mechanisms. It is anticipated that the Building Code issued under the Howard government will be reinstated and, in our view, this Code provides the excessive compliance issues and restricted union involvement and excessive penalties. This Howard government initiated building Code, if reinstated, may encapsulate Local Government work and its related functions.

There has been legal commentary prepared about the inappropriateness of the powers left out of the legislative Bill, but left to be resolved to in the subsequent delegated legislation.⁶ The ASU shares these concerns, and considers that urgent action should be taken to redress this issue.

⁵ Building and Construction Industry (Improving Productivity) Bill 2013 [No 2] (Cth), cl 61 (1), cl 62 (b) (i) – (ii).

⁶ Law Council of Australia, ‘Re-establishment of the Australian Building and Construction Commission’, submission to the Senate Education and Economics Legislation Committee, [5].

The ASU also views with concern aspects of the proposed legislation which makes the coercive powers retrospective. It is noted that Item 2 of Schedule 2 of the Transitional Bill prescribes that the power to obtain information, is applicable to alleged contraventions of the former Building Construction Industry Improvement Act 2005 (Cth), or the former Act, if such behaviour was undertaken prior to the transition time. In this regard, the ASU joins the Law Council in taking the position that any coercive powers contained within the proposed legislation must operate prospectively.⁷

In summation, it is the ASU's position that the proposed legislation appears to be technically flawed, its reach appears difficult to contain, there are difficulties presented as a result of the broad definitions provided in the legislation, and questions have been raised about the appropriateness of its application to particular individuals, local government and various other government authorities.

We would urge the Committee to establish other mechanisms and/or to research other compliance regimes that already exist in Australia and may be more appropriately proposed as alternatives to be put to the Government.

Risks associated with the proposed legislation

The ASU considers that special laws and a special inspectorate for the ABCC could draw in local government, energy and water sector employees. This is because section 6 of the proposed legislation gives an exceptionally broad meaning to what defines a building and construction area of business. It will be a significant problem for the practical application of the legislation.

The ASU holds strong concerns given that its members can be directly involved in building and construction, such as the building and construction of utilities, roads, bridges, amenities, and various building works. Many other ASU members provide additional work and support for public and private tenders, and oversee expressions of interest on government funded work. All associated occupations would therefore likely need to comply with the ABCC.

Exposure to penalties and legal action in the event of non- compliance

The ASU remains highly concerned that the proposed legislation provides for penalties to be applied to entities, including organisations such as trade unions. These penalties can be up to \$170,000. Relatedly, there are penalties of up to \$34,000 which may be imposed upon individuals.

The ASU joins the Law Council of Australia in expressing concern that the penalties being suggested in relation to industrial action, are far too high, and well in excess of those prescribed⁸ within the *Fair Work Act 2009* (Cth).

The "reverse onus" provision is also of concern, and could prove costly for an individual who is dragged before the ABCC, because it would be up to the individual to disprove the allegations against them.

⁷ Law Council of Australia, 'Re-establishment of the Australian Building and Construction Commission', submission to the Senate Education and Economics Legislation Committee, [12, 13].

⁸ Law Council of Australia, 'Re-establishment of the Australian Building and Construction Commission', submission to the Senate Education and Economics Legislation Committee, [13].

Other concerns are that there is a legal costs regime proposed, that could allow an employer to recover their costs from the individual, or their union. Similarly, concerns are held that the ABCC could be given the power to pursue uncapped compensation for damages caused by a contravention.

Workplace Health and Safety Matters

Safety is a primary area of concern to the ASU and any legislation that discourages employees from being able to alert employers to dangers should be rejected. The ASU believes that policing the issue of safety by a secretive ABCC sends the wrong signal to the community and encourages a reduction in standards, as well as undermining existing commitments to human rights by the Australian government.

The ASU considers workplace health and safety to be of utmost importance, and views with concern the possible impact that the Bill may have, given its prohibition on particular kinds of unlawful industrial action⁹. This is because clause 7 of the Bill prescribes that action taken by a worker as a result of concerns about workplace health and safety might not be deemed ‘industrial action’, however the worker bears the burden of proof to establish that he or she took action because of a reasonable concern about an imminent risk to their health and safety, and further that he or she did not unreasonably fail to perform other work that was available.¹⁰

With respect to section 43 of the Bill, which deals with a WHS Accreditation Scheme for commonwealth building work, the ASU holds significant concerns in regard to the potential impact upon local government employees.

The difficulty is not just present in the fact of the legislation targeting a group of workers (in this case local government employees) but also the activities those employees undertake. The employees providing assistance in this area would include building/construction style workers, as well as general local government workers, truck drivers and others who would assist in manufacturing the concrete bollards and shipping them to their location on the highway for use. This, however, meant that the council workers involved in these processes would undertake other duties for the council such as general driving of motor vehicles, ground maintenance, a range of other activities that would be their normal way of work. Hence they would be working within either an ABCC compliant arrangement and/or separate from.

However, the legislative compliance and activities required by the particular department, as per the ABCC legislation, would require the concept of involvement of “whole of business”.

Thus, a council providing such a service to a third party entity and/or directly to the Federal Government (in the form of assistance for roadway construction and related services, everything from stop and go men through to council used graders, items of plant and such, not to mention minor construction work at councils such as a toilet block or other small works, e.g. kerb and guttering) would have to have the whole of their business ABCC compliant.

⁹ Building and Construction Industry (Improving Productivity) Bill 2013 [No 2] (Cth) cl 7.

¹⁰ Building and Construction Industry (Improving Productivity) Bill 2013 [No 2] (Cth) cl 7 (2) (c), cl 7 (4).

The ASU has identified further difficulties within section 45, which is contained within Chapter 5 of the Bill. It is noted that this Chapter applies to the following action:

- a) action taken by a **constitutionally-covered entity**;
- b) action that affects, is capable of affecting or is taken with intent to affect the activities, functions, relationships or business of a **constitutionally-covered entity**;
- c) action that consists of advising, encouraging or inciting, or action taken with intent to coerce, a **constitutionally-covered entity**:
 - (i) to take, or not take, particular action in relation to another person; or
 - (ii) to threaten to take, or not take, particular action in relation to another person.

Upon our review, this could in turn mean that the council's business, (if deemed a constitutional corporation – definitely not conceded by the ASU) which includes libraries, art galleries, community services, childcare facilities, town planners, sport and recreation officers, beach inspectors and many other service areas) would need to have their employment arrangements altered to provide an ABCC compliant instrument.

The ASU considers that section 59 is also problematic. This section states that:

- 1) An agreement is unenforceable to the extent that it relates to building employees if:
 - a) the agreement is entered into with the intention of securing standard employment conditions for building employees in respect of building work that they carry out at a particular building site or sites; and
 - b) not all the employees are employed in a single enterprise; and
 - c) **a party to the agreement is a constitutional corporation and at least some of the employees are employees of that corporation; and**
 - d) **the agreement is not a Commonwealth industrial instrument.**
- 2) A **single enterprise** is:
 - a) a business, project or undertaking that is carried on by an employer; or
 - b) the activities carried on by:
 - (i) the Commonwealth, a State or a Territory; or
 - (ii) **a body, association, office or other entity established for a public purpose by or under a law of the Commonwealth, a State or a Territory; or**
 - (iii) **any other body in which the Commonwealth, a State or a Territory has a controlling interest.**

A practical example of the difficulties that can arise from such an approach is evident within an example available from the energy generation sector. The ASU also has seen similar actions take place in the refit of a power station in Victoria where the company undertaking the construction was advised they would need to have an ABCC compliant agreement for the whole of the site. Because of the way in which the work is executed, the site was the perimeter fencing of the establishment. That included not just the exterior fencing but also the power generation units, the boilers of the power station, and all other factors at that power station including clerical, administrative, payroll, safety, engineering staff and general cleansing and maintenance teams that would have been subject to the ABCC compliant requirements.

The ASU was presented with legal advice from the specific energy company to the effect that they would be included in the legislation and we chose to argue the point out with the company in the most delicate manner. The company did eventually drop its action after many weeks and months of pursuing the arrangement to ensure that the whole of the site was the construction fence.

Another issue identified by the ASU is in regard to section 70 of the Bill. The ASU's position is that the powers of the authorised officers to exercise compliance powers are far too broad, and may potentially be abused. In a similar vein, the ASU is deeply concerned about clause 70 of the Bill, which confers power to enter premises without consent or a warrant. Equally concerning is the fact that the Bill confers power to enter residential premises.¹¹

The ASU has also formed the view that section 94 of the Bill is untenable in its present form. Simply put, the ASU considers that this section is over-reaching in its approach, given that in effect it seeks to combine the conduct of an *"officer, employee or agent (an official) of the body, with any other person at the direction or with the consent or agreement (whether express or implied) of an official of the body, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the official, then the conduct is taken to have been engaged in also by the body"*. It is not agreed that this degree of liability should be assigned, or conferred by the Bill.

The scope of legislation not clear

The ASU relies on the contents of its submission dated 19 February 2016, which outlined its concerns with the scope of the legislation, and provided examples to highlight the practical realities of those concerns, for workers within the local government, water, energy and utilities sectors.

Any council employee providing assistance for roadway construction and related services – for example, providing the traffic management or the council plant machinery – or undertaking minor construction work like building an amenities block or installing roadside kerbs and pavements, could have to be working under an ABCC compliant instrument. The ASU's view is that this could have significant ramifications for local government employees, who could lose current Award or Enterprise Agreement entitlements. The ASU says this could be the case because councils are increasingly reliant on revenue that flows from Federal government funding.

The ASU has also written to Senator Michaelia Cash on 30 May 2016, to request that she confirm whether the broad definitions in the legislation capture ASU members, however she did not reply to our correspondence.

Solution to remove coverage of local government in the ABCC

To assist in ruling out coverage of local government within the ABCC, we suggest that an additional sub-clause is inserted into section (6) of the Bill, in the following terms;

(h) any work that is part of a project for:

(i) activities carried out by a local government entity.

¹¹ Building and Construction Industry (Improving Productivity) Bill 2013 [No 2] (Cth), cl 72 (3).

It is noted that previous legislation of the Howard era sought to define the local government industry as being subject to consideration and involvement by the ABCC legislation. This was undertaken in matters such as the above style authorities picking up undertaking contracts provided by the Federal Government and/or working with a third party private sector contractor in the provision of these services to the Federal Government.

In this regard, we rely on the practical example of this provided in our submission of 19 February 2016. This example was sourced from the local government industry. We understand that a council in NSW was advised that its business needed to become ABCC compliant for it to assist and work with a third party capital infrastructure company that was constructing a major portion of highway under a Federal Government project. The individual council was required or requested, both by way of practicality and expense, to assist with the local community and working with the contractor building this highway to provide the construction of concrete bollards for traffic control. Upon enquiries, the council was apparently told that, to participate in such a project and thereby assist the local community, it would need to have an ABCC compliant agreement that it could use for its workforce.

Other risks arising from the legislation

The ABCC burdens local and state governments with unfair, unsatisfactory and unnecessary requirements that will infringe on workplace rights, and also shift costs to a level of government that is already experiencing severe cuts to funding. Communities deserve greater respect.

The ASU's view is that a new ABCC will not bring justice to Australian people. It won't be good for jobs, it won't improve funding for our schools or world class health care system, it won't crack down on banks and business accountability for corporate crime, it won't make education or aged care more affordable and it won't instil greater decency in our superannuation and other safety-net security.

The proposed legislation and associated 'Building Code' could slash wages. It could remove existing entitlements, such as salary systems and classification structures, provided for under the Local Government (State) Award 2014, or other industrial instrument such as Enterprise Agreements. This could mean alterations to start and finish times, removal of rostered day off systems; shift allowances; consultation on redundancies; the use of labour hire agencies and contracting out of services, as well as gag unions from activities including but not limited to meeting with members, and enforcing appropriate safety measures.

Conclusion

The ASU relies upon and reiterates its views as outlined in its submission dated 19 February 2016, and remains firmly committed to its opposition of the Bills.

The ASU is fundamentally opposed to the introduction of the ABCC Bills on the basis that they are an affront to our system of justice in Australia, and undermine equality before the law.

To this end, the ASU urges the Committee to recommend that both Bills are rejected by the Senate.