

Master Builders Australia

Submission to the Senate Education and
Employment Legislation Committee

on

*Construction Industry Amendment (Protecting
Witnesses) Bill 2015*

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1 Introduction

- 1.1 This submission is made on behalf of Master Builders Australia Ltd.
- 1.2 Master Builders Australia is the nation's peak building and construction industry association which was federated on a national basis in 1890. Master Builders Australia's members are the Master Builder state and territory Associations. Over 125 years the movement has grown to over 33,000 businesses nationwide, including the top 100 construction companies. Master Builders is the only industry association that represents all three sectors, residential, commercial and engineering construction.
- 1.3 The building and construction industry is a major driver of the Australian economy and makes a major contribution to the generation of wealth and the welfare of the community, particularly through the provision of shelter. At the same time, the wellbeing of the building and construction industry is closely linked to the general state of the domestic economy.

2 Purpose of Submission and Background

- 2.1 On 26 March 2015, the Senate referred the Construction Industry Amendment (Protecting Witnesses) Bill 2015 (the Bill) to the Senate Education and Employment Legislation Committee for inquiry and report. The closing date for submissions to the Committee's Inquiry is 10 April 2015.
- 2.2 The Bill would amend the *Fair Work (Building Industry) Act 2012* (Fair Work (Building Industry) Act) to extend the period during which the Director of the Fair Work Building Industry Inspectorate (FWBC) is able to apply to a nominated Administrative Appeals Tribunal presidential member for an examination notice by a further two years. In the absence of the passage of the *Building and Construction Industry (Improving Productivity) Bill 2013* (Productivity Bill) and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013* (Transitional Bill), (the legislation that would restore the Australian Building and Construction Commission (ABCC)) this change is necessary for the proper functioning of the FWBC.
- 2.3 The statement made in last sentence of the prior paragraph should not be taken as supporting the more limited role of the FWBC when compared with that of the proposed re-formed ABCC. Master Builders has consistently

argued for a strong industrial relations regulator to be in place in the building and construction industry. This concern derives from the unique nature of the unlawful industrial behaviour of building unions both on site and off site. The Productivity Bill would restore the ABCC and provide appropriate underpinning powers to that organisation. It is necessary that the ABCC be re-introduced to the industry in order to ensure a return to compliance with the rule of law on building sites and to boost the industry's and the nation's productivity. These matters were made abundantly clear following the release of the interim report of the Royal Commission into Trade Union Governance and Corruption in December 2014.

2.4 The FWBC lacks many of the powers of the ABCC. The FWBC lacks the ability to act as a properly empowered enforcement agency. This deficiency relates not only to the omission from 31 May 2015 of the power to obtain information from examinees which must be addressed by the terms of the Bill, but also by inter alia the truncated role that the FWBC possesses because of the provisions of section 73 and 73A Fair Work (Building Industry) Act.¹ Essentially these provisions mean FWBC is unable to commence or continue litigation where the litigation on the same subject matter has been discontinued because the building industry parties settled their differences.

2.5 Indeed, the powers of the FWBC are considerably less than those wielded by the ABCC. The other most significant reductions and/or problematic areas (with the difficulties associated with the section 73 and 73A restrictions the primary problematic area) are:

- The maximum level of fines that may be imposed for proven breaches has been cut by two thirds.
- The range of circumstances in which industrial action is unlawful and attracts penalties has narrowed, in that the Inspectorate enforces the flawed *Fair Work Act, 2009 (Cth)* (FW Act).
- Parties are no longer forbidden to apply "undue pressure" to make, vary or terminate an agreement.

¹ Recently manifested in practice – see Joe Kelly "Union deal muzzles watchdog" *The Australian* 4 April 2015

- The definition of building work has been narrowed to exclude work performed off-site, thus limiting the ambit of the FWBC's authority.

2.6 Section 46 of the Fair Work (Building Industry) Act is a sunset provision as follows:

The Director may not make an application under section 45 after the end of 3 years after the day on which that section commences.

The period expressed in this section expires on 31 May 2015.

2.7 Paragraph 125 of the Explanatory Memorandum (EM) to the Bill which formed the basis of the Fair Work (Building Industry) Act that is the EM to the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011 sets out the rationale for the sunset provision and is as follows:

This section implements the Wilcox Report recommendation that the compulsory examination power be subject to a sunset clause. It provides that an application for an examination notice may not be made after the end of 3 years after the day on which section 45 commences. It is intended that, before the end of that period, the Government would undertake a review into whether the compulsory examination powers continue to be required.

2.8 In effect the Bill extends the period mentioned in the quotation extracted in the previous paragraph from 3 to 5 years. We emphasise that, as the ABCC is not yet re-formed, the Bill is necessary in order that the FWBC is able to operate effectively in the gathering of evidence. Master Builders reinforces that matter in this submission.

3 Nature of the Powers Exercised and Safeguards

3.1 As expressed in the Explanatory Memorandum for the Bill:

If the Director believes on reasonable grounds that a person has information or documents, or is capable of giving evidence, that is relevant to an investigation into a suspected contravention of the Fair Work (Building Industry) Act or a designated building law, the Director may apply to a nominated AAT presidential member for the issue of an examination notice. Such an application must include certain information so as to enable the AAT presidential member to assess, among other matters, the necessity of issuing the notice. Before issuing an examination notice, the AAT presidential member must be satisfied, for example, that:

- *there are reasonable grounds to believe that the person has information or documents, or is capable of giving evidence, relevant to the investigation;*
- *that any other method of obtaining the information, documents or evidence has been attempted and has been unsuccessful or it not appropriate; and*
- *that the information, documents or evidence would be likely to be of assistance in the investigation.*

3.2 The FWBC's powers of requiring those served with an examination notice to provide evidence are not unusual. Similar powers are exercised by a range of other organisations and those powers are not called into question because it is accepted that they are a necessary part of the operation of the relevant agency. However, because of the controversy that attends the work of the FWBC and its predecessor (and proposed successor) entity, the ABCC, there has been some criticism of the possession of the relevant ability to mandatorily require evidence.

3.3 Master Builders points to the safeguards on other Government agencies that exercise coercive powers; the nature of those powers and the manner of their exercise is set out in a 2008 report. We note in particular the best practice principles articulated in that report *The Coercive Information-Gathering Powers of Government Agencies* (the AG Report)² which establishes those principles for the relevant agencies within the Attorney General's portfolio. The report was tabled by the then Attorney General in the Parliament on 4 June 2008 and is a document of high significance,³ given that it emanates from the Administrative Review Council, appointed under the *Administrative Appeals Tribunal Act 1975* (Cth) to advise the government on these very matters.

3.4 The report identified 20 best practice principles directly relevant to all government agencies in their use of the powers. The principles are based on the application of the administrative law values of fairness, lawfulness, rationality, transparency and efficiency.

3.5 *The Building and Construction Industry Improvement Act, 2005* (Cth) gave the ABCC compulsory information-gathering powers. The ABCC was able to

² A copy of the report can be obtained at: <http://www.arc.ag.gov.au/Documents/a00Final+Version++Coercive+Information-gathering+Powers+of+Government+Agencies+-+May+2008.pdf>

³ Attorney General Media Release *Coercive Powers Report*, 4 June 2008

require persons to furnish information or give evidence. The power and its use attracted a degree of public comment and debate.

- 3.6 The ABCC conducted a thorough review of its procedures against the 20 best practice principles established by the AG Report. The internal review found that the ABCC legislation and procedures complied with all the principles that are applicable to the use of the power.⁴ Similarly, the FWBC complies with and exceeds these safeguards.⁵

4 Rationale for the Powers

- 4.1 The FWBC has as its fundamental remit the function of restoring the rule of law to the building and construction industry. As an agency that has this task it must address the problems associated with a culture of lawlessness, a culture described by the Cole Royal Commission in the following terms:

These findings demonstrate an industry which departs from the standards of commercial and industrial conduct exhibited in the rest of the Australian economy. They mark the industry as singular. They indicate an urgent need for structural and cultural reform. At the heart of the findings is lawlessness. It is exhibited in many ways. There are breaches of the criminal law. There are breaches of laws of general application to all Australians where the sanction is a penalty rather than possible imprisonment. There are breaches of many provisions of the Workplace Relations Act 1996 (Cth).⁶

- 4.2 The Royal Commissioner further observed that:

When courts or tribunals become involved and make orders, some union participants, particularly the CFMEU, regard such orders as not binding upon them. There is the commonly held view, translated into practice that agreements entered into are binding upon unions only insofar as they confer upon the union or its members a benefit, but not insofar as they confer an obligation. Underlying all of this lawlessness is an understanding and expectation, which reflects the reality, that those engaging in unlawful conduct will not be held to account by criminal proceedings, proceedings for penalties, or for loss occasioned to others by unlawful conduct.⁷

⁴ Cth of Australia ABCC Email Alert, "ABCC Compulsory Power Meets Administrative Law Tests", 2 October 2008.

⁵ Communication dated 7 April 2015 to Master Builders from Nigel Hadgkiss Director FWBC.

⁶ *Final Report of the Royal Commission into the Building and Construction Industry*, Summary of Findings and Recommendations, Vol 1, February 2003, p 6.

⁷ *Ibid*

- 4.3 Apart from the breaches of the law which it identified, the Royal Commission also noted that:

... There is much conduct which while not in some circumstances offending the law, is plainly inappropriate. It is inappropriate for a variety of reasons. Some infringes the objects of the Workplace Relations Act 1996 (Cth), if not its detailed provisions. Some unnecessarily interferes with the building and construction process. Some reduces productivity for no reasonable commensurate purpose. Other conduct impinges upon a person's right of free choice. Some conduct departs from recognised norms of civility and behaviour, and some conduct interferes with what most Australians would recognise as their freedom to conduct their businesses and their lives without interference from third parties. This conduct is widespread. It causes concern and uncertainty in the industry and inhibits any relationship of trust and confidence.⁸

- 4.4 Indeed, before the Cole Royal Commission reached the conclusions just touched on, evidence adduced to that Royal Commission showed that the CFMEU, in particular, had previously manifested hostility towards those who sought to investigate unlawful conduct on site. The following is an example of such evidence taken from transcript of 4 June 2002:

What attitude, just by way of overview, would you say the union movement, in particular the CFMEU, has adopted towards investigations by the Office of the 40 Employment Advocate?--- Hostility, I think, might be a - to put it in one word. They have certainly made it very plain to the industry that not only will they not co-operate with any inquiries conducted by the OEA, but they will seek retribution on those who do assist in those inquiries.⁹

- 4.5 This hostility and the surrounding culture of fear had a palpable outcome. The need to protect witnesses in the context of the building and construction industry was starkly highlighted in the report of the Interim Building Industry Taskforce (IBIT), set up after the Cole Royal Commission findings but established without compulsory information gathering powers. The following two extracts highlight the need for these powers:

The Final Report of the Royal Commission cited the possibility of retribution against persons who appeared before the Royal Commission as one of the reasons to establish an interim taskforce. This conclusion proved to be correct as the Taskforce has received information from subcontractors who have not been

⁸ Ibid

⁹ The Royal Commission into the Building and Construction Industry transcript 4 June 2002 evidence of Mr John Copeland, p 7576

awarded any contracts since testifying before the Royal Commission. In every instance, it has been expressly indicated by the victim that they have been targeted as a consequence of their involvement with the Royal Commission, effectively being black-banned from the industry.

Unlike the Royal Commission, the Taskforce is unable to require persons to assist with many of its investigations. This severely restricts the ability of the Taskforce to conduct investigations to uncover any such attempts to take revenge upon subcontractors. Likewise, there have been frequent instances where subcontractors will not use the services of the Taskforce because they fear their businesses will be black-banned. Disturbingly, similar experiences have been reported across the country. In nearly all circumstances, the fear of losing future contracts overrides the need to support steps to enforce the law.¹⁰

And

(T)he Taskforce has investigated over 380 matters in its 17 months of operation. Of this number, the Taskforce has had to finalise approximately 50% of these investigations due to the lack of powers to gather information. These investigations have had to be finalised because witnesses will not make a statement or victims have simply given up...¹¹

- 4.6 Clearly, the compulsory powers are used to assist witnesses who might otherwise be reluctant to speak up; otherwise, as experienced by the IBIT, witnesses will not make a statement and victims will 'give up'. In this context, we fully endorse the comments of the Director of the FWBC, Mr Nigel Hadgkiss as follows:

There is no doubt that the compulsory powers which we and other federal government agencies have are critical to doing our job of trying to uphold the law on building and construction sites in Australia," he said. "Reports that we drag people in off the street and interrogate them are absolute nonsense. The powers are largely used to protect whistleblowers who want to give us evidence but are terrified of retribution.¹²

- 4.7 To reinforce the proposition made by Mr Hadgkiss about alarmist comments on the examination process, we note that the FWBC does not have the power to prosecute a person for failing to attend an examination. The Director has only the capacity to refer a matter of this kind to the Commonwealth Director

¹⁰ *Upholding the Law – One Year On: Findings of the Interim Building Industry Taskforce*, 25 March 2004 at <http://fwbc.gov.au/sites/default/files/UpholdingTheLawReport2004.pdf> accessed 8 April 2015 at p 13.

¹¹ *Ibid* p 18.

¹² Joe Kelly "Powers 'Needed to Curb CFMEU" *The Australian* 20 March 2015

of Public Prosecutions who may or may not choose to prosecute, depending on the normal exercise of the safeguards applying to his office. Subsection 52(1) Fair Work (Building Industry) Act makes it an offence to fail to comply with requirements imposed by an examination notice to produce documents, information or attend to answer questions. It is also an offence to fail to take an oath or affirmation when required to do so or to refuse to answer questions relevant to the investigation when being examined. The penalty for this offence is a maximum of 6 months' imprisonment. A note refers to the fact that, pursuant to the *Crimes Act 1914*, a court may impose a maximum fine of 30 penalty units instead of, or in addition to, a term of imprisonment.

5 Continuing Need for Greater Powers

5.1 We support passage of the Bill. However, we emphasise that under the Fair Work (Building Industry) Act the power to compel witnesses to give evidence is hedged about with many so-called "safeguards". These include the ever-present threat of being "switched off" by the strange and unnecessary power held by the Independent Assessor.¹³ Master Builders submits that the Bill's provisions should be viewed as temporary, as is envisaged by their terms (i.e. extending the sunset provisions). The effectiveness of the powers held by the FWBC as a tool of information gathering is substantially reduced when compared with the prior ABCC or the proposed ABCC's powers.

5.2 Master Builders believes the only way, in the medium term, to curb the unacceptable behaviour which has emerged in the building and construction industry as reinforced by the findings of the Royal Commission into Trade Union Governance and Corruption is to re-introduce the former ABCC regime. Passage of the Productivity Bill would achieve that step as well as introduce some improvements to the prior law. In the meantime, the current Bill is essential so that the FWBC, albeit with less than optimal powers, may continue its work.

6 Conclusion

We urge the Committee to recommend the passage of the Bill.

¹³ See Chapter 7, Part 1, Division 2 of the Fair Work (Building Industry) Act 2012