ACTU submission to the Senate Education and Employment Legislation Committee

Building and Construction Industry (Improving Productivity) Bill 2013

19 February 2016

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Overview

1. Recent public discussion of this Bill has gone hand in hand with discussion about the *Royal Commission into Trade Union Governance and Corruption*.

2. One thing that needs be understood very clearly is that this Bill is not a Bill about trade union governance, nor is it a Bill about corruption. This is a Bill about the regulation of industrial relations, and nothing more. In some material respects, it in fact does things that the Report of that Royal Commission clearly states ought not be done.

3. At the time of writing, the Government is engaging in series of roundtables concerning workplace relations policy. Notably absent from those discussions to date, at least those which our organization has been invited to participate in, has been any mention of the ABCC. Like the rest of the Workplace Relations Framework, the Building and Construction Industry has been the subject of an inquiry and report, yet a fulsome consultation on the recommendations of that inquiry has not followed. Rather, this Government seems inexorably wedded to the re-establishment of the ABCC in the form in which it was proposed in this Parliament nearly two years ago, and relevantly almost indistinguishable from the entity that bore that name during the Howard Government. The overt threat of a double dissolution on the basis of a failure to pass this Bill demonstrates an irrational attachment to what on any measure is and was bad policy.

4. No amount of paper shuffling and contortion has yielded any credible economic argument in favour of the ABCC. Nor has the passage of time provided any revelatory comparisons about a positive impact on the industry. Rather, the most significant change in environment has been Australia's recent adoption of the *Korea-Australia Free Trade Agreement* and the *Trans Pacific Partnership Agreement*. Through those instruments, Australia has re-stated its commitment to its trading partners to the very international labour rights that the International Labour Organization has found the ABCC laws to have violated. For the Government to knowingly and so enthusiastically renege on those commitments, particularly so soon after re-stating them, is enormously disappointing and potentially damaging to our trading relationships.

5. The ACTU supports a strong stance against corruption in all its forms. Corruption offends the values of the trade union movement and, beyond the immediate economic

impacts on its victims, can effect confidence in the economy and its institutions as well as a country's international reputation. We do not suggest that the construction industry is immune from corruption, and in fact official statistics from the Australian Securities and Investment Commission suggest that it is a poor performing sector on that front. However, if this government is serious about tackling corruption, a very different legislative response is indicated. To this end, the ACTU supports the establishment of a national anti-corruption body to investigate corruption in all its forms.

6. We oppose the Bill in its entirety.

Features of the Bill

7. The central features of this Bill are:
    a. The re-establishment of the Australian Building and Construction Commission;
    b. Enabling and enforcement of the Building Code;
    c. The creation of industry specific industrial relations laws for the Building and Construction and other industries; and
    d. Coercive powers with less independent oversight.

8. We address each of these central features in turn below.

Re-establishment of the ABCC

9. The ABCC, as it existed under the former BCII Act, distinguished itself by the aggressive, coercive and biased manner in which it carried out its activities. It focused overwhelmingly on the investigation and prosecution of workers and trade unions, thus failing in its primary obligation as a regulator to enforce the law impartially. It did very little to address the significant and widespread issues in the building industry such as the underpayment or non-payment of wages and entitlements, occupational health and safety issues or sham contracting.

10. Our affiliate, the CFMEU, undertook a detailed study of sham contracting in the Building and Construction industry in 2011[1], in which it estimated that between nine and sixteen percent of persons working in the construction industry were sham contacting and that the tax leakage attributable to sham contracting was in the in the order of $2.457 billion per annum. Because the ABCC had a policy position for most of its period of operation that it did not even investigate let alone prosecute employers who had not paid the wages and entitlements legally owed to its workers, it did nothing to address this problem. In fact, the opposite was the case because it administered and enforced laws that were designed to ensure that the wages and conditions of persons on building sites that were described as "contractors" could not be scrutinized let alone improved by unions in negotiations with employers.

[1] CFMEU Construction and General Division, "Race to the bottom: Sham contracting in Australia's Construction Industry", March 2011.

11. Adding to the concerning reality that the construction industry consistently rates as either the highest or second highest as against all other industries when it comes to unpaid employee entitlements[2], data from the Australian Bureau of Statistics suggests that close to 10% of all workplace injuries occur in the construction industry, and that between 2013 and 2014 over 50,000 people in that industry suffered a work related injury[3]. In 2014, the construction industry accounted for 16% of workplace fatalities, our third worst performing industry.[4] The construction industry is known to be a dangerous industry, and whilst we agree that State and Territory Health and Safety legislation is an appropriate vehicle to regulate this, we note that those laws assume or are dependent upon properly functioning workplace organisation to identify, address and monitor health and safety risks. Accordingly, unions play a critical role in those frameworks. The provisions of the Bill are directed to toward discouraging or hindering the participation of workers in unions and to that end might undermine the efficacy of those models. In circumstances where the third most common reason for not making a workers' compensation claim after reporting an injury is worry about a "Negative impact on current of future employment"[5], it is clear that more needs to be done to empower and support workers in dangerous industries.

12. Further, the business to business relationships in the construction industry have been shown to be highly problematic. A recent Report from the Senate Economics Committee observed:

> "Businesses now operate in an environment in which non-payment for work carried out is commonplace, cash flows are uncertain and businesses lower down in the subcontracting chain have little power relative to those at the top of the chain. In this environment, there is very little incentive to invest the necessary capital to adopt new and innovative construction methods, invest in new capital equipment or invest in workforce skills development."[6]
>
> "The committee considers that the estimates of the incidence of illegal phoenix activity detailed in this report suggest that construction industry is being beset by a growing culture among some company directors of disregard for the corporations law. This view is reinforced by the anecdotal evidence received by the committee which indicates that phoenixing is considered by some in the industry as merely the way business is done in order to make a profit.

[2] Senate Economics References Committee, "I just want to be paid: Insolvency in the Australian Construction Industry", December 2015, p. xx.
[3] ABS 6324.0, Table 4.1
[4] Safe Work Australia, "Work Related Traumatic Injury Fatalities, Australia 2014", October 2015.
[5] ABS 6324.01, Table 11.1. This explanation ranks behind only "Minor injury/not considered necessary" and "Not covered or not aware of workers' compensation".
[6] Senate Economics References Committee, "I just want to be paid: Insolvency in the Australian Construction Industry", December 2015, p. xxxi.

> The committee is particularly concerned at evidence that a culture has developed in sections of the industry in which some company directors consider compliance with the corporations law to be optional, because the consequences of non-compliance are so mild and the likelihood that unlawful conduct will be detected is so low.
>
> This culture is reflected in the number of external administrator reports indicating possible breaches of civil and criminal misconduct by company directors in the construction industry. Over three thousand possible cases of civil misconduct and nearly 250 possible criminal offences under the Corporations Act 2001 were reported in a single year in the construction industry. This is a matter for serious concern. It suggests an industry in which company directors' contempt for the rule of law is becoming all too common."[7]

13. The Committee's comments were made in the context of a wide-ranging inquiry into insolvency in the construction sector. It made 44 recommendations directed to avoiding and remedying instances of non-payment and insolvency in the construction industry, including increased use of project bank accounts, amendment to Corporations Act provisions concerning the avoidance of employee entitlements, the establishment of an inquiry into statutory trusts, a legislative prohibition on intimidation, coercion or threats in relation accessing remedies under security of payments legislation and that a "fit and proper person" test apply across the breadth of the construction sector through requirements in state licensing regimes.

14. The Report of the Economics Committee was notable for its absence of a dissenting report. Rather, Coalition Senators included "Additional Comments" in which they:

    a. Acknowledged the problems described:

    "Clearly, the evidence presented during the course of the inquiry shows that the high rate of insolvencies in the building and construction industry is adversely impacting on the health and integrity of the Australian economy. The social impact and economic cost—not to mention the indirect effects on productivity—stemming from the high rates of insolvency in the sector, is worrying."[8]

    and;

    b. Acknowledged the need to act:

    "The Government will give a considered response to the full list of recommendations in due course"[9]
    "..any regulatory responses need to address all instances of systemic illegal or improper behavior in the construction industry"[10]

[7] Senate Economics References Committee, "I just want to be paid: Insolvency in the Australian Construction Industry", December 2015, p. xxix-xx.
[8] Senate Economics References Committee, "I just want to be paid: Insolvency in the Australian Construction Industry", December 2015, p. 195.
[9] *Ibid.*

15. Shockingly, notwithstanding the references in the title of the Bill *to Improving Productivity*, neither the ABCC nor the Bill are designed to have any positive impact on the matters of concern identified in the Committee's report. Rather, the Bill relates only to workplace relations matters and specifically union activity. And whilst much of the debate and rhetoric surrounding the Bill has contained references to the report of the Royal Commission into Trade Union Governance and Corruption, the reality is that the Bill pre-dates that Report and cannot by any stretch be considered to be responsive to it.

16. We do not consider it appropriate to comment specifically on any matters that the Royal Commission referred for investigation or prosecution, or on any insolvency related matters that are currently underway. We do however find it perplexing that number of instances of alleged wrongdoing described by the Royal Commission, which consumed tens of millions of dollars of resources, used investigative powers, was assisted by Police taskforces, was singularly focused on its task and had before it documents going back to 1992, is far less than that which a Parliamentary Committee comprised of busy Senators was able to ascertain about the level of non compliance by businesses in the sector in a single year largely through resort to statistics published by ASIC.

17. Unions are known to be effective advocates for quality training and career paths that build productivity and for safer workplaces. Unions are also adept at the early detection, investigation and remedying of underpayments. The reanimation of a statutory agency that sees its role as the frustration of those laudable objectives is precisely what the building and construction industry does not need.

18. Finally, we would urge the Committee not to be persuaded by the suggestion in the Report of the *Royal Commission into Trade Union Governance and Corruption* that the ABCC is neither biased nor discriminatory. We believe that its coercive powers as well as its enforcement actions make the case that it is both. The fact that legal proceedings might have be brought with a proper legal basis against in law against unions does not answer the issue of bias in circumstances where the prosecutor elects to look the other way when confronted with the misdeeds of employers, or where the laws themselves

[10] Senate Economics References Committee, "I just want to be paid: Insolvency in the Australian Construction Industry", December 2015, p. 196.

are the type which the government has promised the international community it will not pass. Further, the Report dismissed allegations of discrimination on the basis that

> "The short answer to this argument is that the essence of discrimination lies not only in 'the unequal treatment of equals' but also 'in the equal treatment of those who are not equals' where the different treatment or unequal outcome is not the product of relevant distinction"[11]

We respectfully part company with the Report as we believe that construction workers ***are*** equals with other workers. Further, the report attributes the quotations in the above passage to *Austin v. Commonwealth* (2003) 215 CLR 185. The full quotation, not produced in the Report, is as follows:

> "The essence of the notion of discrimination is said to lie in the unequal treatment of equals or the equal treatment of those who are not equals, where the differential treatment and unequal outcome is not the product of a distinction which is *appropriate and adapted to the attainment of a proper objective"* (emphasis added)

19. We regard the ABCC as serving a distinction which is neither appropriate nor adapted to the attainment of a proper objective. It is directed toward rendering industrial activity - that is legal and protected by federal and international law – illegal in the building industry.

Enabling and enforcement of the Building Code

20. The Bill contains provisions that authorise the making of a Building Code, and provide for its enforcement. The Building Code is an instrument that building companies and the Commonwealth can be required to comply with in relation to building work. It can also apply to other entities if they perform building work in a Territory or a Commonwealth place. The ABCC can direct persons to report on their compliance with the Building Code, and can seek civil penalties against them if they fail to provide that information, or if they provide that information later than is requested of them. Where the Building Code applies, ABCC inspectors can enter premises. They can also issue compliance notices, requiring persons to comply with the Building Code. Non-compliance with these notices is enforceable by civil penalties.

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[11] Royal Commission into Trade Union Governance and Corruption, "Final Report: Volume 5", Commonwealth of Australia 2015, at Chapter 8, [108].

21. An "Advanced Release" of the intended Building Code has already been published. It applies to builders (and also their related entities) if they tender for Government funded work. If they do tender for that work, it also applies to privately funded work.

22. The Code is highly objectionable, as it contains restrictions on legitimate industrial relations practices that are lawful in every other industry. For example:
    a. Individual employment contracts can be made, but collective employment contracts can't;
    b. Enterprise agreements with building companies cannot prescribe safe staffing levels;
    c. Enterprise agreements with building companies cannot contain terms to ensure that labour hire workers are not discriminated against in their rates of pay for doing the same work;
    d. Enterprise agreements with builders cannot insist on only skilled, trained tradespeople doing dangerous work;
    e. Building company managers and union representatives are not allowed to agree to meet at building sites;
    f. The independent umpire, the Fair Work Commission, is not allowed to resolve disputes freely. For example, if workers complain about unfair rostering or unfair treatment of their leave requests, the Fair Work Commission cannot remedy the unfairness because it is not allowed to limit the employers right to determine who does what work when.

23. These substantive restrictions on industrial relations practices cannot be regarded as beneficial (mutually or otherwise). Even the Report of the *Royal Commission into Trade Union Governance and Corruption* dismissed the suggestion that the building industry needed industry specific industrial laws.[12]

24. In an unusual step, the Code requires that enterprise agreements made from April 24 2014 need to be compliant with its requirements. Accordingly, a number of businesses may be non-compliant if the Bill is passed and the Code is tabled as intended. The only manner in which many could become compliant would be to seek the variation or

[12] Royal Commission into Trade Union Governance and Corruption, "Final Report: Volume 5", Commonwealth of Australia 2015, at Chapter 8, [186].

termination of their existing enterprise agreements, which could lead to legitimate disputation.

Industry Specific Industrial Laws

25. In addition to the industry specific industrial laws found in the Building Code, the Bill proposes to introduce the following provisions for the building and construction industry:
    a. Clause 8 of the Bill, which modifies the definition of 'protected industrial action' within the meaning of the *Fair Work Act* so as to exclude industrial action if it is engaged in concert with, or if the organisers include, persons other than an employee or an employee organisation, its members or an officer, that are bargaining representatives for the proposed enterprise agreement;
    b. Clauses 47 and 48, which introduce a new and wide prohibition on persons engaging in or organising 'unlawful pickets', defined to include action that is industrially motivated and restricts persons from accessing or leaving a building site (and ancillary sites as defined in clause 9), has the purpose of doing so, or 'would reasonably be expected to intimidate' such persons;
    c. Clause 48 of the Bill, which enables *any person* to apply to a court for an injunction against unlawful industrial action or an unlawful picket and expands the circumstances in which the general discretionary power to issue injunctions may be exercised;
    d. Clause 49 of the Bill, which modifies the rules concerning payment relating to periods of industrial action found in Division 9 of Part 3-3 of the *Fair Work Act* so that the rules only apply to the more narrow definition of 'protected industrial action' provided in the Bill;
    e. Clauses 52-55, which deal with coercion in a manner partly replicating and partly neutering the existing protections against coercion in the *Fair Work Act*. We are particularly concerned that clause 54 of the Bill is expressed to operate to the exclusion of provisions in the *Fair Work Act*. This could conceivably operate to allow conduct to occur which would otherwise be unlawful, and deprives disputants of access to the dispute resolution functions of the Fair Work Commission under Subdivision B of Division 8 of Part 3-1 of the *Fair Work Act*;

f. Clause 59 of the Bill, which renders project agreements unenforceable. We note that this clause constitutes a breach of the principle of free and voluntary collective bargaining embodied in Article 4 of the *Right to Organise and Collective Bargaining Convention, 1949 (No. 98)*.[13] This principle includes placing no restrictions on the freedom of parties to choose the level at which they bargain.[14]

26. Both the Wilcox inquiry in 2009 and the Report by the Royal Commission into Trade Union Governance and Corruption found no need for there to be different substantive industrial relations laws applying in the building industry.[15]

27. If the alleged "need" for specific industrial laws is said to be linked to productivity or the incidence of industrial action, the case for specific industrial laws is not at all compelling. The statistical arguments asserting a positive productivity impact range from the highly equivocal to the outright wrong. We refer in particular to our previous submission to the References Committee on the last occasion this Bill was presented and to the answers we gave to questions taken on notice during hearings of that Committee. In relation to the incidence of industrial action, we re-iterate that there is no evidence to suggest that industrial disputation in the building industry is at historically high levels or that the rate of disputation in the industry has materially increased in the period since the ABCC was abolished. Indeed, the rate of industrial disputation in the industry remains extremely low relative to its historic levels. The other important consideration regarding industrial action is that official statics draw no distinction between industrial action that lawful and that which is not.

Coercive powers with less independent oversight

28. The ACTU strongly opposes the re-introduction in Chapter 7 of the Bill of coercive powers exercisable by the ABCC in a similar form to that existing under the former BCII Act. Under clause 61 of the Bill, the ABC Commissioner is empowered to require any person to provide information or documents in relation to an investigation of a

[13] Section 64 of the BCII Act, upon which this clause was presumably modelled, was found by the Committee on Freedom of Association and the Committee of Experts to contravene Australia's obligations under Convention No. 98.
[14] ILO, General Survey on Freedom of Association and Collective Bargaining (1994), at [249]
[15] Wilcox, M., "Transition to Fair Work Australia for the Building and Construction Industry", Commonwealth of Australia 2009, at [1.19]; Royal Commission into Trade Union Governance and Corruption, "Final Report: Volume 5", Commonwealth of Australia 2015, at Chapter 8, [186].

suspected contravention of the Bill or a designated building law, or to compulsorily interrogate any person who may have such information or documents. A person must comply with an examination notice, on pain of six month's imprisonment.[16]

29. A careful examination of these provisions, which is the Committee's task, will once and for all expose the fact that any assertion that the ABCC will use these powers to investigate corruption or other criminal activity is blatantly untrue. Whilst its powers are indeed expansive, they may only be exercised for limited purposes. Examination notices can only require the production of information or the answering of questions relevant to a suspected contravention of industrial relations laws: The *ABCC Act*, *the Fair Work Act*, The *Fair Work (Transitional Provisions and Consequential Amendments) Act* and the *Independent Contractors Act*. If the ABCC steps outside this limited remit, it is acting unlawfully. It has no power to use the information it obtains unlawfully, let alone share it with other authorities. Nor may it have resort to examination notices to investigate a suspected contempt of court. This is a matter that, with respect, we consider the report of the *Royal Commission into Trade Union Governance and Corruption* deals with in an entirely incorrect way.

30. That is not to say that the powers granted to ABCC are limited in manner which makes them acceptable. Coercive information gathering powers have no place in the enforcement of industrial laws. These powers impinge upon the rights of individuals, including the right to protection of property and privacy, the right to silence, and statutory rights to the protection of personal information. These types of coercive powers are similar to those available in connection with the examination of suspected terrorists, save that compulsory interrogation of suspected terrorists requires a warrant to be issued by a Federal Judge or Magistrate,[17] whereas the ABCC under this Bill may issue its own.[18]

31. These extraordinary powers are not used to investigate allegations of criminal behaviour, but rather they are used to investigate whether workplace laws have been breached. The ABCC has a proven track record of abusing those rights – one needs only to look to the failed prosecution of *Ark Tribe* and the routine issuing of 203 defective compulsory examination notices to appreciate this. The recent revelations that legal

[16] Clause 62.
[17] *Australian Security Intelligence Organisation Act 1979,* Part 3, Division 3.
[18] Clause 61.

proceedings for illegally striking were wrongly commenced against 28 workers who were not actually rostered to be working in any event[19] also raises serious questions. How could a fair minded and diligent regulator commence proceedings about an alleged work stoppage without being more certain about something as fundamental as who it was that was required to be working? In the absence of a satisfactory explanation is it unreasonable to ask whether some broader objective of frightening workers about being involved in a union played some role?

32. The public interest favours keeping these types of powers out of the industrial arena to ensure that, insofar as the powers are directed towards workers (as they have been overwhelmingly in Australia), they do not impinge upon the exercise of industrial rights, like the right to associate, organise and take collective action.

33. While maintaining our strong objection to the retention of coercive information gathering powers in this context, the ACTU supported the introduction through the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act 2012* of safeguards surrounding the use of these powers. We strongly oppose the removal of some of these critical safeguards through the Bill. These include:

    a. the requirement for the inspectorate to make an application for an examination notice to a Presidential Member of the Administrative Appeals Tribunal;[20]
    b. the requirement for the presidential member to be satisfied that a case has been made out for the use of the coercive powers, having regard to a number of factors;[21]
    c. the capacity under the FWBI Act for certain stakeholders to make an application to an Independent Assessor to have such compulsory powers 'switched off' on particular building projects. The Independent Assessor must not switch off compulsory powers at a particular building project unless the Independent Assessor is satisfied that it would be appropriate to do so having regard to the objects of the FWBI Act and the public interest;[22]

19 http://www.abc.net.au/news/2016-01-21/more-charges-against-nedlands-industrial-action-workers-dropped/7106042
20 FW (BI) Act, s.45.
21 FW (BI) Act, s.47.
22 FW (BI) Act, s. 39.

d. the prohibition on the Director requiring a person attending an examination to enter into a confidentiality undertaking in relation to the examination;[23]
e. the sunsetting on the use of coercive powers, with a decision whether to extend those powers to be made after that time expires[24]; and
f. provisions for the payment of legal expenses incurred as a result of attending a compulsory examination[25].

34. There is no evidence to suggest that the existence of these safeguards impeded in the work of Fair Work Building Industry Inspectorate (FWBII) in any way.

[23] FW (BI) Act, s.51(6).
[24] FW (BI) Act, s. 46.
[25] FW (BI) Act, s.58(1)

International Labour Rights and Free Trade Agreements

35. Australia is subject to international obligations in the field of human rights under customary international law and as a result of ratification of international legal instruments. Failure of Australia to abide by its obligations to respect human rights (which include a number of basic workers' rights) has significant implications for the protection and promotion of human rights in Australia and Australia's reputation internationally.

36. The former BCII Act – upon which this Bill is explicitly based[26] - was found repeatedly and unequivocally by the UN's International Labour Organisation (ILO) to constitute a serious breach of Australia's obligations both as an member-state and as a signatory to specific conventions including the *Freedom of Association and Protection of the Right to Organise Convention, 1947 (No. 87),* the *Right to Organise and Collective Bargaining Convention, 1949 (No. 98)* and the *Labour Inspection Convention, 1947 (No. 81)*.

37. The following features of the BCII Act were found by the ILO supervisory bodies (the tripartite Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations) to contravene Australia's international obligations:

    a. Those provisions which rendered a wide range of industrial action 'unlawful';
    b. The imposition of penalties and sanctions upon workers and unions that engage in 'unlawful industrial action' that were significantly higher than those imposed by the *Workplace Relations Act 1996;*
    c. Provisions within the Act that rendered project agreements unenforceable;
    d. Provisions of the National Code of Practice for the Construction Industry and the associated Implementation Guidelines (as they then existed) which sought to promote, through the availability of Commonwealth funding, restrictions on freedom of association and collective bargaining;
    e. The 'expansive' monitoring, investigatory and enforcement powers of the ABCC which, according to the ILO's Committee on Freedom of Association, '… could give rise to serious interference in the internal affairs of trade unions';

[26] Second Reading Speech, *Building and Construction (Improving Productivity) Bill 2013,* 14 November 2013.

f. the absence of any provision within the Act to ensure that any penalties imposed under its provisions were proportional to the offence committed; [27] and

g. the ABCC's focus on investigating, examining and prosecuting workers and trade union officials.[28]

38. The majority of the provisions in the BCII Act which were the subject of criticism by the ILO are reproduced in the current Bill. It is clear, therefore, that without significant amendment, passage of this Bill will take Australia significantly further from compliance with Australia's obligations under international law. The ACTU submits that this is a matter that the Government, and the Australian Parliament, should consider of significant import.

39. Finally, with respect to Australia's international obligations, the ACTU strongly objects to the proposition in the Statement of Compatibility with Human Rights (attached to the Explanatory Memorandum) to the effect that the Bill is compatible with the human rights and freedoms recognised or declared in international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011.*

40. As the Statement of Compatibility recognises, the statute has far-ranging and serious implications on human rights. This includes, but is not limited to, implications for rights to freedom of association under article 22 of the *International Covenant on Civil and Political Rights* (ICCPR) and article 8 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), as well as the right to peaceful assembly in article 21 of the ICCPR and rights to freedom of expression under article 19(2) of the ICCPR. Further,

[27] ILO: Committee on Freedom of Association, *Case No 2326 (Australia):* Report No. 338, November 2005; Report No. 342, June 2006; Report No. 348, November 2007; and Report No 353, March 2009; i ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations: General report and observations concerning particular countries,* Report III (Part 1A), International Labour Conference, 95th Session, Geneva, 2006; p. 43; ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations: General report and observations concerning particular countries,* Report III (Part 1A), International Labour Conference, 96th Session, Geneva, 2007, p. 43 and p.47; ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations: General report and observations concerning particular countries,* Report III (Part 1A), International Labour Conference, 97th Session, Geneva, 2008, pp.47-48 and p.54; ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations: General report and observations concerning particular countries,* Report III (Part 1A), International Labour Conference, 98th Session, Geneva, 2009, pp. 54-55 and p. 58; ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations: General report and observations concerning particular countries,* Report III (Part 1A), International Labour Conference, 99th Session, Geneva, 2010, p.58 and p. 60; and ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations: General report and observations concerning particular countries,* Report III (Part 1A), International Labour Conference, 101st Session, Geneva, 2012, pp. 60-61 and p. 63.

[28] ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations: General report and observations concerning particular countries,* Report III (Part 1A), International Labour Conference, 100th Session, Geneva, 2011, p. 500; and ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations: General report and observations concerning particular countries,* Report III (Part 1A), International Labour Conference, 99th Session, Geneva, 2010, p. 490.

while omitted from the Statement of Compatibility's summary of the obligations in article 8(1) of the ICESCR,[29] it is also important to note that this sub-article of the ICESCR explicitly protects the right to strike.

41. We note the failure of the Compatibility statement, in the context of its discussion of the implications of the Bill for freedom of association as protected in article 22 of the ICCPR and article 8 of the ICESCR, to identify or engage with comments made by the Committee on Economic, Social and Cultural Rights (the UN Committee of experts tasked with reviewing UN member-states compliance with the ICESCR) specifically in relation to the BCII Act. In its Concluding Observations on Australia's Fourth Periodic Report under the ICESCR in 2009, the Committee stated:

> 'The Committee is concerned that provisions of the Building and Construction Industry Improvement Act 2005 seriously affect freedom of association of building and constructions workers, by imposing significant penalties for industrial actions, including six months of incarceration. The Committee is also concerned that before workers can lawfully take industrial action at least 50 per cent of employees must vote in a secret ballot and a majority must vote in favour of taking the industrial action which unduly restricts the right to strike, as laid down in article 8 of the Covenant and ILO Convention No. 87 (1948) concerning Freedom of Association and Protection of the Right to Organise.(art. 8).
>
> **The Committee recommends that the State party continue its efforts to improve the realization of workers' rights under the Covenant. It should remove, in law and in practice, obstacles and restrictions to the right to strike, which are inconsistent with the provisions of article 8 of the Covenant and ILO Convention No. 87. In particular, the Committee recommends that the State party abrogate the provisions of the Building and Construction Industry Improvement Act 2005 that imposes penalties, including six months of incarceration, for industrial action ....**[30]' [emphasis in original].

42. In light of this Observation, as well as the consistent and unequivocal criticism of the former BCII Act by the ILO supervisory bodies (outlined above), we find the proposition in the Statement of Compatibility with Human Rights that 'the Bill will enhance workers' right to freedom of association' to be highly objectionable.[31]

43. Adding to the weight of international institutions criticisms of the ABCC regime is the prospect of an issue being raised by one of our trading partners under either the *Korea-*

[29] Statement of Compatibility with Human Rights, p. 51.
[30] Committee on Economic, Social and Cultural Rights, Forty-Second Session, Geneva, 4 – 22 May 2009 at [19].
[31] Statement of Compatibility with Human Rights, p. 52.

Australia Free Trade Agreement or the *Trans Pacific Partnership Agreement*. Both agreements contain some commitment in relation to labour standards.

44. Under Chapter 17 of the *Korea-Australia Free Trade Agreement*, Australia:
    a. Affirms its obligations as a member of the International Labour Organization. This includes obligations to implement and comply with conventions that Australia has ratified[32];
    b. Affirms its commitments under the *Declaration on Fundamental Principles and Rights at Work and its Follow-up*. This includes a recognition that all ILO members (including Australia) have an obligation to respect, promote and realise, in good faith in accordance with the ILO constitution, the principles concerning fundamental rights which are the subject of ILO conventions; and
    c. Specifically commits to endeavour to adopt or maintain in its laws, regulations, policies and practices, the fundamental principles of freedom of association and the effective recognition of the right to collective bargaining.

45. We make no assertion that these provisions of the *Korea-Australia Free Trade Agreement* are enforceable under the Dispute Resolution provisions of the Agreement – it is clear the Agreement only requires consultation between the parties in various forms in an attempt to resolve their differences. However, in the event Australia's clear non-compliance with its commitments was raised by Korea, we suspect that a response that amounted to the private international law equivalent of a distinction between "core" and "non-core" promises would be considered neither diplomatic nor satisfactory.

46. The situation under the *Trans Pacific Partnership Agreement* is somewhat different. The substantive obligations under Chapter 19 of that agreement are similar to those above, in that, Australia:
    a. Affirms its obligations as a member of the ILO; and
    b. Specifically commits to adopt and maintain in its statutes and regulations and practices, the rights of freedom of association and the effective recognition of the right to collective bargaining as stated in the *Declaration on Fundamental Principles and Rights at Work and its Follow-up.*

[32] ILO Constitution, Article 5(d)

However, unlike the case with the *Korea-Australia Free Trade Agreement* these commitments *are* enforceable through the dispute resolution provisions of the agreement[33].

47. Should the Bill be passed, we will once again raise the matter of Australia's non-compliance with its ILO obligations with the appropriate authorities.

[33] Chapter 19, Article 19.15(12), Chapter 28.

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