



Submission to the Inquiry into the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011

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Introduction

1. The passage of the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011 (hereafter 'The Bill') would be a retrograde development.
2. The Bill, in conjunction with related policy and administrative decisions by the Government, signifies the dismantling of effective regulation of workplace relations in the building and construction industry. The intent of every aspect of the Bill is to diminish the capacity to combat unlawful conduct across the industry.
3. The Royal Commission into the Building and Construction Industry was established in August 2001. It was the start of a concerted effort to address the industry's appalling record of lawlessness. In 2005 the Australian Building and Construction Commissioner (ABCC) was created. Respect for the rule of law was restored. The rights of all building industry participants gained greater protection.
4. As a result of this bill, the industry will now return to lawless practices of the past. Ten years of effort will be largely wasted.
5. The impact on the Australian economy will be severe. The cost of projects will rise. Project delays and disruption will become more common. Improvements in productivity will be almost impossible to win.
6. Unwelcome trends are already emerging following the Government's decisions to relax the regulatory regime. The Australian Bureau of Statistics (ABS) measure of industrial disputes, working days lost per thousand employees, reflects these trends. Industrial disputation has been climbing steadily over the last two years. The number for recent June Quarters is instructive:
 - 48.6 days lost per 1,000 employees - 2004
 - 1.7 days lost per 1,000 employees - 2008
 - 44.7 days lost per 1,000 employees - 2011.
7. The industry's employer parties have expressed concern at the recent deterioration in workplace relations conduct. The ABS data underestimates the real effect of the industry's industrial lawlessness. The impact of bans and limitations, common practices on building sites, are not counted. The introduction of the Bill into this worsening environment is a major retrograde step.
8. The Bill is not simply about the abolition of the ABCC and its replacement by the Office of the Fair Work Building Industry Inspectorate. It is about creating a new and diminished regulatory scheme.
9. Before the introduction of this Bill the Government had already taken steps to impair accountability. The application of the National Code has been compromised. Several decisions, culminating in a redrafting of the National Code Implementation Guidelines dilute

their influence over contractors. The ABCC's approach to administering its Act has been altered thereby releasing the unions' pent up frustrations at being restricted from pursuing their full array of tactics to control the industry's labour supply.

10. The Bill is a further and significant step along the path to dismantle effective control over the industry's workplace relations practices. Every aspect of the Bill diminishes the capacity to combat unlawful conduct. The Bill's features that are the most damaging are highlighted below. The relevant section of the Bill is referenced, where appropriate.

Object of the Legislation

11. The Bill substantially alters the objects of the legislation. Objects directed to addressing the industry's deep seated problems are removed. The objects deleted addressed:
 - a. respect for the rule of law;
 - b. respect for the rights of industry participants;
 - c. holding industry participants accountable for unlawful conduct;
 - d. working efficiently and productively; and
 - e. encouraging high levels of employment.
12. Instead the Bill introduces trendy concepts into the objects such as a balanced framework, cooperative relations, harmonious relations and safeguards on the use of powers. The new objects are divorced from the reality of the industry's practices. They signal an equivocal approach and will constrain the effectiveness of the new body. S3

Red Tape

13. The Bill includes 33 additional procedures and administrative processes. Much of this comes about through the roles conferred on the new bodies that will become involved in the regulatory task and their interaction with the regulator. The effect is to divert the attention and resources away from the core task of securing lawful conduct.

Independence

14. The independence of the regulator is markedly reduced. The task of the regulator is challenging. A strong and independent regulator is a fundamental requirement. The Bill substantially undermines this crucial independence.
15. An Advisory Board is to be created. Its role is to make recommendations about the policies, programs and priorities of the Director. Recommendations may not be legally binding, but it would be unwise for a Director to make it a practice to not adopt Board recommendations. An Advisory Board with a recommendatory power is novel constraint that is not imposed on other like regulators. S24
16. The independence is further compromised by additional powers of interference given to the Minister. The Minister is to be empowered to give a written direction about the policies, programs and priorities of the Director. The direction has the force of a legislative

instrument. *S11(1)(a)*

17. This gives the Minister considerable power to dictate the activities of the Director. For example, the regulator may in the Government's mind be paying too much attention to coercion by union officials. This can be rectified by the Minister issuing a direction to give priority to other matters such as superannuation. A Director who chose not to comply would have no option but to resign.
18. The Minister also acquires the power to request the Advisory Board to consider any matter. *S24(c)*
19. The new provisions appear to be based on a premise that the work of the regulator is readily planned. This misunderstands the role. Much of the work is driven by complaints received. The complexity and length of investigations and legal proceedings can be difficult to predict.
20. A new approach to the disclosure of information presents a further avenue to undermine the independence of the regulator. The Director will now be able to disclose information to the Minister, the Secretary of the Department, or an employee of the Department to assist in the consideration of a complaint or issue. Complaints are best dealt with through administrative law and appeal mechanisms. The need to consider requests for information from the Minister and the Department does not engender confidence that the regulator will be shielded from political interference. *S64(3) and (4)*
21. The Director is also able to disclose information to the Advisory Board. This would have to be treated with the utmost caution given the industry and union representation on the Advisory Board. The disclosure of information to members of the Advisory Board may deter participants from lodging a complaint about unlawful conduct. *S64(5)*
22. In a broader context, the roles to be assumed by the Administrative Appeals Tribunal and the Independent Assessor also detract from the independence of the regulator. The Director will have to apply to and gain the approval of the Administrative Appeals Tribunal in order to conduct a compulsory examination. A determination by the Independent Assessor will limit the reach of the Director's compulsory examination power.

Unlawful Industrial Action, Coercion and Penalties

23. A most damaging change introduced by the Bill is the removal of sections dealing with unlawful industrial action, coercion, discrimination and the penalty arrangements that applied. This change more than any other indicates a naive understanding of the industry's workplace relations. *S51 and 52*
24. The maximum penalties for contraventions are reduced to levels that are 33 per cent of the levels in the *Building and Construction Industry Improvement Act 2005* (BCII Act). The maximum financial penalties now become \$33,000 for a body corporate and \$6,600 for a person. The deterrent effect of penalties is basically eliminated. This is compounded when

it is recognised that the courts were moving to higher penalties in response to repeat offences by a number of unions and their officials.

25. Twelve ABCC cases have resulted in penalties in excess of the Fair Work Act (FW Act) maxima. The majority have been decisions made since 2009.
26. The transfer to these compliance provisions to the FW Act demonstrates a fundamental misunderstanding of the nature of unlawful industrial action in the industry. Unlawful work stoppages and bans are usually directed at the head contractor. The head contractor does not employ many staff. Most staff on a site are employed by subcontractors and on large sites 50-100 subcontractors could be engaged. However, the subcontractor is often unaware of the industrial action or its cause.
27. The BCII Act facilitated the prosecution of such action. The FW Act makes this a more difficult undertaking by reducing the circumstances under which unlawful industrial action attracts a penalty. For example, the prosecutions achieved in the infamous Westgate Bridge and Epping Markets disputes would have been problematic under the FW Act provisions. In addition the penalties would have been 2/3rds lower.
28. Occupational health and safety (OHS) is often misused as a reason for work stoppages. Under the BCII Act a person relying on ohs for stopping work had to prove the reason was legitimate. In contrast under the FW Act the onus of proof is imposed on the employer or the regulator. This makes proof of misuse harder to accomplish and will result in an increase in the misuse of OHS.
29. The transfer to the FW Act eliminates the BCII Act injunction provisions. As a result the granting of injunctions to stop industrial action will become more difficult.
30. The transfer to the FW Act also reduces the capacity to recover costs in a successful prosecution. Costs have become a very pertinent consideration in many cases and can induce cooperation during mediation and conciliation. Unlike the BCII Act, the FW Act limits costs to circumstances where there has been an unreasonable act or omission that caused the applicant to incur costs.

Compulsory Examination Power

31. The compulsory examination power has proved to be effective and controversial.
32. It was introduced because a code of silence backed by threats and intimidation pervades the industry. More than 50 per cent of building industry investigations undertaken by the Employment Advocate lapsed due to a lack of cooperation from witnesses.
33. The nature of the power was often misconstrued in the robust debate associated with its use. The power is not used against the target of an investigation, the contravener. A person subject to a compulsory examination is granted immunity from prosecution. Its use is

directed at uncooperative or reluctant witnesses.

34. Witnesses prove to be uncooperative or reluctant because of intimidation to prevent assistance with an investigation. A significant proportion representing 35 per cent of examinations were requested by the witness as a means of providing some protection against intimidation or worse.
35. The use of the power has declined over the past year. The ABC Commissioner has applied many of the procedures recommended by the Wilcox Report. A fanciful rationale has been advanced that inspectors have more success at gathering information voluntarily and that participants are now more cooperative.
36. The result of a reduced use of the power is that unlawful conduct is increasing, participants are more fearful and coercion and intimidation have returned to past levels. The Bill simply adds to these damaging developments. A deteriorating situation will be made worse.
37. An elaborate and cumbersome procedure for Administrative Appeals Tribunal (AAT) oversight is imposed by the Bill. It includes the Director submitting a very detailed affidavit setting out the grounds supporting an examination. The discretion of the regulator to move expeditiously to a compulsory examination is removed. The AAT member has a range of factors to consider before issuing an examination notice. The current trend of issuing notices very sparingly will continue. *S45,47*
38. The factors that the Bill specifies must be considered before issuing notice include a catch all *"having regard to all the circumstances, it would be appropriate to issue the examination notice."* *S47(1)(f.)* The Explanatory Memorandum states that this would allow the AAT member to be satisfied the alleged breach was sufficiently serious or there was no undue impact on the potential examinee. A more demanding test is contemplated by the Bill than applied under the BCII Act. It is likely that some of the requests that previously justified a compulsory examination would not satisfy the new standard of proof.
39. The Bill allows an examinee to have a lawyer of their choice. This overcomes a Federal Court decision upholding the right of the ABCC to decline representation by a particular lawyer. Again a misconception of the power is at play. The examination is part of an investigation. It is not a legal proceeding alleging contravention. A potential exists to complicate the conduct of an investigation and for delays and expenses to rise as lawyers of choice manage their time commitments. *S51*
40. The Bill allows an examinee to claim fees and allowances incurred in attending the examination. The Explanatory Memorandum refers to accommodation, travel and legal expenses. This is a misplaced entitlement. The witness is a person who has chosen not to give information voluntarily. The regulator suffers delays to an investigation and incurs considerable additional expenses. It is incongruous why the witness should then be entitled to the reimbursement of expenses. *S58*

Independent Assessor

41. The examination power is also to be subject to the peculiar notion that it may be turned off for particular projects. A new office of Independent Assessor is introduced for this purpose. Once again elaborate administrative procedures attend the initiative. *S39-43*
42. It is difficult to justify such an unusual approach to regulation. The turning off concept was not recommended by the Wilcox Report, the source of many of the Bill's amendments. The compulsory examination power affected a fraction of construction projects even when it was used more frequently. In the past year only a handful of projects have been touched by the exercise of the power. In any case the power can be reimposed by the Independent Assessor upon an application by the Director.
43. The Bill allows the Minister or interested persons to apply for the power to be turned off. The identity of interested persons is left to the regulations. However, the determination process involves interaction with the Director and the applicant. Building and construction projects involve many interested parties such as the client, head contractor, subcontractors, employees and unions. A turning off determination could be made in circumstances where some of the parties may be unaware of the move.

Regulations

44. The Bill leaves a number of provisions to be augmented by the Regulations. There are at least seven instances of using the Regulations in the Bill. Some of these are significant:
 - a. matters the Independent Assessor must be satisfied about before making a determination, *S39(3)*;
 - b. the types of interested persons, other than the Minister, who may apply for a determination by the Independent Assessor, *S36(2)*; and
 - c. additional matters for the AAT Presidential member be satisfied about before issuing an examination notice, *S47(1)(g)*.
45. Such matters have the potential to materially affect the application and reach of the Act. It would be preferable for there to be scrutiny of any significant augmentation of the powers granted by the Bill. The Bill will have a devastating effect on the industry. Industry participants are entitled to expect certainty about the new arrangements.

Conclusion

46. The Bill is effectively a dismantling of the tenacious regulation required to achieve lawful workplace relations. Coercion, intimidation, threats, low productivity and excessive increases in labour costs will re-emerge with a vengeance to trouble the industry. The industry will no longer be patrolled by a tough watchdog.
47. People and businesses that desire to go about their affairs in a lawful and productive manner will find this pursuit more difficult. The Government by introducing the Bill is letting down decent people who want to conduct their affairs in a lawful manner. Unlawful and

intimidatory conduct has no place in Australian commerce and should not be tolerated.

48. This Bill neutralises the weapons to fight unlawful and thuggish conduct in the building and construction industry. The Australian community and economy will be worse off.