

MINISTER FOR EMPLOYMENT

SUBMISSION TO THE SENATE EDUCATION AND EMPLOYMENT REFERENCES COMMITTEE INQUIRY INTO THE GOVERNMENT'S APPROACH TO RE-ESTABLISHING THE AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION

Introduction

From the outset, I note that the Coalition has long expressed its commitment to re-establish the Australian Building and Construction Commission, including taking it to both the 2010 and 2013 elections as a key policy.

The then Opposition opposed the former Labor Government's watering down and then abolition of the Australian Building and Construction Commission noting:

Coalition Senators completely reject the government's claim that the Building and Construction Industry Improvement Bill (Transition to Fair Work Bill) 2011 delivers 'a tough cop on the beat in the construction sector'. Coalition Senators – as expressed when this Bill was first presented to the Parliament in 2009 – were fearful that this Bill would turn the Australian Building and Construction Commission into a toothless tiger. Along with Labor's last minute amendments, it is now clear that this Bill will ensure that it will now be a toothless mouse suffocating in red tape.¹

The Government stands by the Department of Employment's submission to the Senate Education and Employment Legislation Committee's inquiry into the Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013, tabled on 2 December 2013.

This submission should be considered alongside that submission which I have attached for the convenience of the Committee.

Terms of Reference

While the Government respects the Senate, I respectfully point out that the Terms of Reference for this inquiry are skewed towards a particular outcome. Furthermore, all of the matters covered in the terms of reference have been exhaustively considered by the Cole Royal Commission, the Transition to Fair Work Australia for the Building and Construction Industry report delivered by the Honourable Murray Wilcox QC (the Wilcox Review) and previous Senate Committee inquiries.

The Australian Building and Construction Commission was established as a result of the recommendations of the Cole Royal Commission. The Wilcox Review, commissioned by then Minister for Workplace Relations, the Hon. Julia Gillard MP, recommended the retention of an industry specific regulator.

Need for Legislation

The construction industry provides many jobs for workers in small business, large enterprises and contractors. It is critical to a productive, prosperous and internationally competitive Australia.

The Coalition Government recognises the importance of an industry that is vital to job creation and which is essential to Australia's economic and social well-being.

¹ Coalition Senators Dissenting Report, Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011 [Provisions], 29 February 2012

The need to re-establish the ABCC, underpinned by provisions put in place in 2005, is clear. While the ABCC existed, the performance of the building and construction sector improved. During its period of operation, the ABCC provided economic benefits for consumers, higher levels of productivity, less days lost to industrial action and a respect for the rule of law.

For many years the building and construction sector provided the worst examples of old fashioned industrial relations lawlessness. Projects were delayed, costs blew out and investment in our economy and infrastructure was jeopardised. The Final Report of the Cole Royal Commission in 2003, found that the industry was characterised by unlawful conduct and concluded that:

“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”²

On the WA construction industry it concluded:

“In many respects the rule of law has little or no currency in the building and construction industry in Western Australia.”³

“The building and construction industry in Western Australia is marred by unlawful and inappropriate conduct. Fear, intimidation and coercion are commonplace. Contractors, subcontractors and workers face this culture continuously. At the centre of this culture and much of the unlawful and inappropriate conduct is the CFMEU.”⁴

“The CFMEU exercises a position of dominance and power often disproportionate to its on-site presence, in terms of the number of workers on-site who are members of the CFMEU.”⁵

“Threatening and intimidatory conduct by the CFMEU is a hallmark of the industry. It occurs in relation to securing union-endorsed EBAs, securing membership of the CFMEU, discouraging the use of non-union EBA subcontractors, ‘recruitment’ drives and inter-union coverage issues, amongst other matters.”⁶

On the Victorian construction industry it concluded:

“The rule of law has long since ceased to have any significant application within the Victorian building and construction industry.”⁷

“The principal deficiencies in the current regulatory regime that were identified in Victoria relate to misuse of rights of entry by union officials and the misuse of OH&S issues in order to advance industrial demands.”⁸

“Pattern bargaining is pursued by most unions which have members employed in the Victorian industry.”⁹

² Final Report of the Royal Commission into the Building and Construction Industry, 24 February 2003

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

“These union delegates are permitted to conduct site inductions, and this process provides the means by which unions are able to ensure that the ‘no EBA no start’ and ‘no ticket no start’ regimes are adhered to.”

“The evidence before the Commission established that unlawful industrial action is common and widespread on Victorian building sites that are regarded as ‘union sites’.”¹⁰

“As these comments indicate, a culture has developed within a significant section of the industry in Victoria in which union officials consider that they are free to pursue union goals without regard to the rights of others or to the legality of what they are doing.”¹¹

“A culture of disregard for the law (including orders of the Australian Industrial Relations Commission and the Victorian Supreme Court), and the rule of law, especially by officials and members of the Construction, Forestry, Mining and Energy Union (CFMEU).”¹²

“Injunctions and orders of the AIRC have been ignored.”¹³

“It is, therefore, sufficient to note the extent of the misconduct, the way in which it has come to be an expected phenomenon in the Victorian industry and the rarity with which legal redress for loss and damage suffered as a result of such action is pursued.”¹⁴

Justice Cole recommended an industry-specific regulator with the power to compel evidence on the grounds that industry participants were discouraged from reporting unlawful behaviour due to threats and intimidation. Such powers are by no means unique and are granted to other Commonwealth regulators and bodies such as Medicare and Centrelink.

Justice Cole further recommended that penalties for breaches of laws in the industry be higher, due to the prevalence of such conduct.

The establishment of the ABCC in 2005 provided a genuinely strong watchdog for the building and construction industry. The ABCC was responsible for decreased lawlessness in the industry and significant productivity gains that benefitted every Australian and the Australian economy as a whole.

Labor abolished the ABCC in 2012. The regulator which Labor established to replace the ABCC, the Fair Work Building Industry Inspectorate (Fair Work Building and Construction or FWBC), has significantly weakened powers and its budget was slashed by one-third so as to inhibit it from effectively undertaking its role. The fines for unlawful industrial action were also reduced by two-thirds and necessary industry-specific laws repealed.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

The outcome of the actions by Labor to abolish the ABCC was predictable. Emboldened by the abolition of the ABCC, union bosses initiated wildcat stoppages and militant protests. Some of these were extensively reported in the media, such as those involving the Myer Emporium site in August 2012; the Little Creatures brewery site in Geelong in late 2012; and the City West Water dispute in early 2013. These disputes were accompanied by violence, threats to workers if they tried to cross picket lines, and the intimidation of members of the community.

We have also seen how union bosses have thumbed their noses at the potential fines for breaches of the law with some even claiming that “we’ve got to break the f...ing law sometimes”¹⁵ and who regard fines as part of the cost of doing business “I think we’re going to take a few knocks, we’re going to take some huge fines. But we will pay them”¹⁶.

The Government notes the recent decision of the Federal Court in Perth where Justice Michael Barker found that the CFMEU’s Mr Joe McDonald “conduct involves a calculated and careless attitude to the law governing the employment of persons by employers”¹⁷

Mr McDonald, the National President and standard bearer of the CFMEU, is a serial offender and has been fined more than \$1 million for various actions in which he has been involved since 2005.¹⁸ Mr McDonald’s continued conduct is a case-in-point for the need for this legislation.

Re-establishing the ABCC and the Act it oversees is important to halting the ongoing slide into lawlessness that is facing the building and construction industry. These measures are essential to boosting Australia’s productivity and to ensuring law and order prevails at our nation’s building sites.

Where particular industries have particular industrial relations challenges, it is not uncommon to have specific rules for them. For many years the Textile Clothing and Footwear industry has had special rules to deal with vulnerable outworkers. The union movement itself has strongly advocated the introduction of a separate industry tribunal for the road transport industry (the Road Safety Remuneration Tribunal, established by the Gillard Government).

Further, the Government supports the following comments of then Shadow Minister for Workplace Relations Julia Gillard who said in 2007:

*“Obviously, what the building and construction sector is looking for is that they want a tough cop on the beat. They want to make sure there is strong compliance in the building industry with industrial law and we will be ensuring that by keeping the Australian Building and Construction Commission until January 2010 and then ensuring a seamless transition to a specialist division of Fair Work Australia which would be tough on compliance. **We want to make sure that no one is engaged in improper conduct in the building industry, whether employer, union or employee.**”¹⁹*

And then as Workplace Relations Minister she said:

“...Of course, this is also an industry where there are parts of it with significant industrial troubles and disruption. I have publicly talked about those. For those parts,

¹⁵ Sunday Age, 27 October 2013, p.3

¹⁶ Australian Financial Review, 15 October 2013, p.3

¹⁷ CFMEU and Joseph McDonald penalised in FWBC Case, 20 December 2013 <<http://www.fwbc.gov.au/cfmeu-and-joseph-mcdonald-penalised-fwbc-case>>

¹⁸ Ibid.

¹⁹ Deputy Opposition Leader Julia Gillard, ABC News Radio – Batholomew, 2 August 2007

there should be absolutely vigorous, hard-edged compliance and no tolerance at all for unlawfulness”

“...Each and every breach of the law is wrong and each and every breach of the law should be acted upon.”²⁰

Labor's Record in Government

Prior to the 2007 election, the Australian Labor Party's purported approach was to retain a “tough cop on the beat” in the building industry, though it was equivocal on the sort of powers it would have. Its initial policy was to establish a semi-autonomous “Building Industry Inspectorate” within Fair Work Australia. This ultimately became the FWBC .

The Rudd Government commissioned former Federal Court judge Murray Wilcox QC to conduct an inquiry and report on the options for establishing such a body and also consider the powers it should have. The Wilcox Report was released in 2009 and the then Government's bill reflected its recommendations, the most significant of which was to introduce additional oversight over the use of the coercive powers, which in practice have reduced their use to negligible levels.

The original bill to abolish the ABCC and establish its successor was introduced to Parliament in 2009 but lapsed prior to the 2010 election. A new bill was ultimately passed in 2012. On 1 June 2012 the FWBC replaced the Office of the ABCC.

The powers, status and funding of FWBC have fallen far short of what Mr Rudd and Ms Gillard had promised and even short of what the Wilcox Report recommended.

Under the BCII Act, maximum penalties for breaches under that Act were over three times greater than equivalent offences under the Fair Work Act and its predecessor legislation (\$22,000 for individuals and \$110,000 for organisations under the BCII Act versus \$6,600 for individuals and \$33,000 for organisations under the former *Workplace Relations Act 1996*). This reflected the fact that breaches of laws were more common in the industry and existing penalties had been ineffective as a deterrent for certain unions. Penalties were reduced to the same level as other sanctions under the Fair Work Act (\$6,600 and \$33,000 at the time the BCII Act was repealed – a reduction of two-thirds for unions.)

In the latter years of the ABCC, courts were progressively handing down higher penalties against recalcitrant unions, in recognition of their “repeat offender” status. These include the record penalties of \$1 million against the CFMEU and its organisers in the West Gate Bridge case. The ability of courts to impose progressively higher penalties is essential in encouraging specific deterrence. This approach has now been severely undermined by the reduction in penalties. The Coalition has confidence in the judicial system who has the final say on penalties that are imposed.

The Bill to abolish the ABCC was passed by the House of Representatives on 16 February 2012. Prior to the Bill passing but after the second reading debate had concluded, the then Minister, Mr Shorten, introduced two Government amendments (initially proposed by Mr Adam Bandt MP), which were passed, and which provided that:

- FWBC must not institute court proceedings in relation to any “settled matters” that were previously the subject of court proceedings between the parties; and
- FWBC must no longer participate in court proceedings in relation to “settled matters”, where such matters are those in which it was either an intervener or a joint applicant.

²⁰ House of Representatives Hansard, 13 August 2009

The result of these amendments has been that FWBC now has weaker powers than the Fair Work Ombudsman, which is still able to pursue legal proceedings relating to wages and entitlements, even if a private settlement has been reached.

In 2009, Julia Gillard told the ACTU congress that the building industry needed a strong enforcement body with the ability to prosecute conduct that she herself said she was “appalled” by:

“Like me, I am sure you were appalled to read of dangerous car chases across Melbourne City involving carloads of balaclava wearing people, criminal damage to vehicles resulting in arrests, threats of physical violence and intimidation of individuals, including damage to a private residence....

Balaclavas, violence and intimidation must be unreservedly condemned as wrong by every unionist, every ALP member, every decent Australian. And the Rudd Labor Government will do everything necessary to ensure that we do not see this appalling conduct again.”

“This is another part of our commitment to fairness and decency at work.”

The House amendments to the Bill resulted in the FWBC not being able to pursue such conduct, no matter how “appalled” anyone is by it (the Westgate Bridge dispute was a “settled matter” where a legal settlement was reached between the parties).

Neither Labor’s 2007 election policy nor the original 2009 bill included any reference to FWBC having no power to act if a matter was “settled”.

The Coalition has noted with interest the linkage between this broken promise and the significant financial and political links between the CFMEU and the ALP.

- The CFMEU was fined over \$3 million in prosecutions brought by the ABCC and its successor.
- The CFMEU has donated \$4.5 million nationally to the ALP since 2007. It is the ALP’s second-highest union donor. It has donated over \$9 million since 2000.

In Victoria, the CFMEU was formally admitted to the ALP Socialist Left faction in January 2013. Media reports at the time spelt out what this would mean for the Party:

“THE union at the centre of last year's 16-day Grocon CBD dispute has been welcomed back into State Opposition Leader Daniel Andrews's faction of the ALP.

“By joining the Socialist Left, the CFMEU will gain influence over party policy-making and pre-selections.”²¹

The CFMEU’s influential new role in the faction was welcomed by its Victorian Convener, Andrew Giles, now the ALP Member for Scullin:

“The SL secretary [Andrew Giles] said his faction regarded the CFMEU as a Left union with which it “shared broader political values...”

In Western Australia, the CFMEU is still controlled by Kevin Reynolds and Joe McDonald, who remain influential in the ALP. McDonald is now an ALP member, despite being allegedly “expelled” by Kevin Rudd prior to the 2007 election, for bullying behaviour on work sites that Mr Rudd described as “totally unacceptable”.

Mr McDonald was recently appointed national president of the CFMEU.

²¹ *Rebel union welcomed back in State Opposition Leader Daniel Andrews’ ALP faction”, Herald Sun, 14 February 2013*

Compulsory Examination Powers

Some Labor members in the House of Representatives Debate have raised concerns about the ABCC's use of compulsory examination powers.

These powers are needed to ensure the ABCC is able to carry out its investigations effectively. They were a key element in the ABCC's success in breaking down the entrenched 'culture of silence' in the sector which allows illegality to prosper.

The powers in the Bill were recommended by the Cole Royal Commission, which noted that the ABCC would "need to penetrate the veil of silence behind which many decisions to take unlawful action are hidden".²²

These kinds of powers are not novel and are also granted to a range of other Commonwealth regulatory bodies, such as the Australian Competition and Consumer Commission, the Australian Prudential Regulation Authority, the Australian Securities and Investment Commission, the Australian Taxation Office, Centrelink and Medicare.

Contrary to the scenario painted by the Labor Opposition repeatedly both in Parliament and in the public arena, people subject to a notice **will not** disappear from the street and be detained without legal representation.

The Bill contains a number of safeguards to ensure that the examination notice process is implemented appropriately.

The Commissioner's power to give a written notice to a person can only be delegated to a Deputy Commissioner, or to an SES employee if no Deputy Commissioners are appointed. This will ensure that the application of this power is only undertaken by the people most accountable for its use.

Any person questioned by the ABCC using the powers available **will** have the right to have a lawyer present if they so choose.

Notices to appear must be issued with at least 14 days' notice. This is in line with the same notice period that Medicare uses when exercising similar powers and longer than some notices issued by Centrelink (which can be as little as 2 days).

The Commonwealth will also fund reasonable travel expenses to appear at examinations.

Importantly, the Commonwealth Ombudsman will have a continuing oversight role of the examination notice process.

The Government notes that while in office, the Australian Labor Party did not remove nor change the similar powers available to Medicare, Centrelink, Australian Competition and Consumer Commission, the Australian Prudential Regulation Authority, the Australian Securities and Investment Commission or the Australian Taxation Office. Nor did it refer them for investigation by any Parliamentary committee. The powers available to some of these bodies require less notice and have less oversight than those proposed in this legislation.

The Government supports the observations of Justice Wilcox QC who found in his report, commissioned by then Minister Gillard:

*"It is understandable that workers in the building industry resent being subjected to an interrogation process that does not apply to other workers.... I sympathise with that feeling and would gladly recommend against grant of the power. **However, that***

²² Final Report of the Royal Commission into the Building and Construction Industry 24 February 2003
Volume 11, Page 38

would not be a responsible course. I am satisfied there is still such a level of industrial unlawfulness in the building and construction industry, especially in Victoria and Western Australia, that it would be inadvisable not to empower the BCD to undertake compulsory interrogation. The reality is that, without such a power, some types of contravention would be almost impossible to prove."²³

Workplace Health and Safety

Work health and safety is primarily the legislative responsibility of state and territory governments. The Act that established the former ABCC, and this Bill now, contain no provisions that would prevent legitimate safety issues in the building industry from being addressed by employees, unions, or state and territory WHS regulators.

The ABCC's role under the Bill will be to regulate workplace relations.

That said, Safe Work Australia figures clearly show that the incidence rate of serious claims (claims per 1,000 employees) in the construction industry consistently fell during the time of the ABCC, in keeping with trends in other industries.

The Government is committed to using its influence as a client and provider of capital to foster improved safety standards and culture throughout the building industry. For this reason, the Bill retains the role of the Federal Safety Commissioner and the Australian Government Building and Construction WHS Accreditation Scheme.

Productivity

The ABS confirms that productivity grew during the ABCC's period of operation. Further, the 2013 Independent Economics report found that during the ABCC era:

- construction industry multifactor productivity rose by 16.8 per cent (based on the latest ABS data) in the ten years to 2011-12 (after ABS data had found that multifactor productivity in the construction industry was no higher in 2000-01 than it was 20 years earlier²⁴;
- consumers were better off by around \$7.5 billion annually; and
- fewer working days were lost through industrial action.

Independent Economics is a firm that was used by the former Government to model some of its key policies including the Minerals Resources Rent Tax.

ABS data confirms that, in the five years before the ABCC commenced operations, the industrial dispute rate in the construction sector was five times the all industries average. During the period of the operation of the ABCC, the rate of disputes in the construction industry dropped to twice the all industries average. Under the current regulator, FWBC, the dispute rate has increased back up to four times the overall figure.

Industrial Disputes

As shown in the chart below, during the period when the ABCC was in operation (i.e. 1/10/05 to 31/05/2012), the quarterly average industrial dispute rate in the construction industry was 9.6 working days lost per 1000 employees (WDL/000E), and this was just about twice of the quarterly average rate of all industries (4.2 WDL/000E) over the same period.

²³ Transition to Fair Work Australia for the Building and Construction Industry Report, March 2009, Page 3 Paragraph 1.23

²⁴ Independent Economics: Economic Analysis of Building and Construction Industry Productivity: 2013 Update, 26 August 2013, Page 27

However, for the periods before the ABCC commencement and after its abolition, the quarterly average industrial dispute rate in the construction industry was not only much higher than the quarterly average in the industry when the ABCC was in operation, it was also much higher than the quarterly average of all industries for the same period:

Pre-ABCC

| Period | Construction | All Industries |
|----------------|---------------------|-----------------------|
| December 2000 | 41.5 | 8.2 |
| March 2001 | 48.5 | 9.1 |
| June 2001 | 98.8 | 16.6 |
| September 2001 | 69.2 | 14.3 |
| December 2001 | 63.7 | 10.4 |
| March 2002 | 51.2 | 9.2 |
| June 2002 | 52.9 | 8.0 |
| September 2002 | 44.2 | 6.7 |
| December 2002 | 76.3 | 8.6 |
| March 2003 | 86.3 | 8.1 |
| June 2003 | 30.4 | 6.8 |
| September 2003 | 56.5 | 20.4 |
| December 2003 | 75.4 | 18.4 |
| March 2004 | 51.2 | 9.7 |
| June 2004 | 48.6 | 18.4 |
| September 2004 | 71.1 | 11.3 |
| December 2004 | 52.8 | 6.1 |
| March 2005 | 43.5 | 5.3 |
| June 2005 | 32.8 | 6.1 |
| September 2005 | 37.4 | 5.7 |

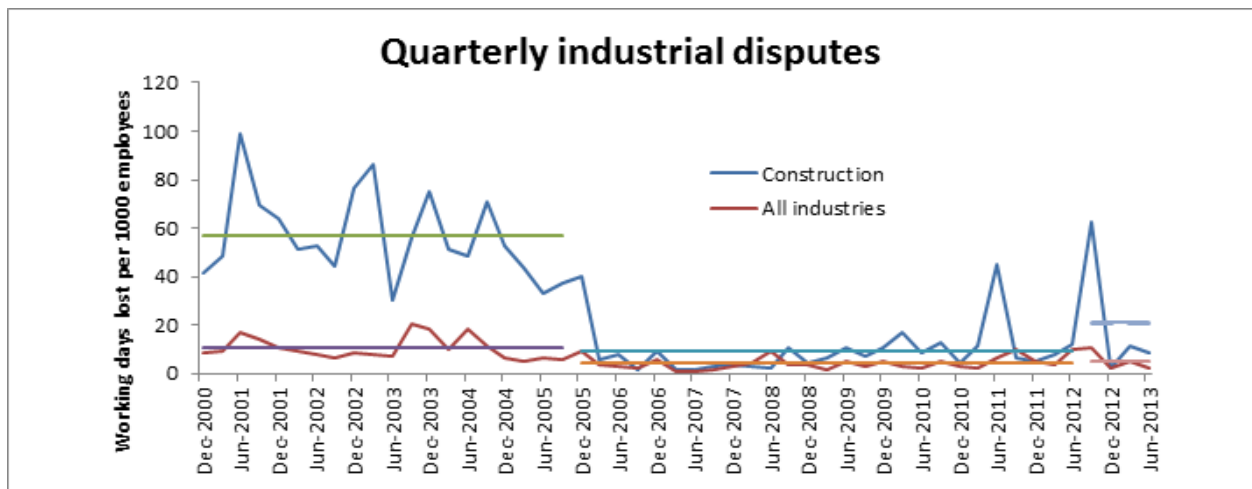
During period of the ABCC

| Period | Construction | All Industries |
|----------------|---------------------|-----------------------|
| December 2005 | 40.1 | 9.3 |
| March 2006 | 5.7 | 3.4 |
| June 2006 | 7.6 | 3.2 |
| September 2006 | 1.6 | 2.3 |
| December 2006 | 9.1 | 6.0 |
| March 2007 | 1.5 | 0.8 |
| June 2007 | 1.7 | 0.8 |
| September 2007 | 3.1 | 1.2 |
| December 2007 | 3.8 | 2.6 |
| March 2008 | 2.9 | 4.5 |
| June 2008 | 2.0 | 9.1 |
| September 2008 | 10.3 | 3.8 |
| December 2008 | 4.6 | 3.3 |
| March 2009 | 6.1 | 1.2 |
| June 2009 | 10.6 | 5.0 |

| | | |
|----------------|------|------|
| September 2009 | 6.9 | 3.1 |
| December 2009 | 10.4 | 4.7 |
| March 2010 | 17.2 | 3.0 |
| June 2010 | 8.7 | 2.4 |
| September 2010 | 12.5 | 4.7 |
| December 2010 | 4.0 | 2.7 |
| March 2011 | 11.3 | 2.0 |
| June 2011 | 44.7 | 6.5 |
| September 2011 | 6.5 | 10.1 |
| December 2011 | 5.2 | 5.3 |
| March 2012 | 8.0 | 3.5 |
| June 2012 | 12.1 | 9.9 |

Post ABCC

| Period | Construction | All Industries |
|----------------|--------------|----------------|
| September 2012 | 62.7 | 10.8 |
| December 2012 | 2.3 | 2.5 |
| March 2013 | 11.2 | 5.0 |
| June 2013 | 8.4 | 1.9 |
| September 2013 | 8.5 | 2.2 |



Conclusion

This legislation gives effect to the Government's well established policy to re-establish the ABCC to boost productivity and ensure law and order prevails at Australia's building sites, whether on-shore or off-shore. It delivers on the promises the Coalition took to the 2010 and 2013 elections.

I commend this important legislation to the Committee

(ENDS)



Australian Government

Department of Employment

**SENATE STANDING COMMITTEE ON
EDUCATION AND EMPLOYMENT**

**Building and Construction Industry
(Improving Productivity) Bill 2013**

**Building and Construction Industry
(Consequential And Transitional
Provisions) Bill 2013**

INTRODUCTION

1. The Department of Employment welcomes the opportunity to make a written submission to the Senate Standing Committee on Education and Employment Inquiry into the Building and Construction Industry (Improving Productivity) Bill 2013 (the Bill) and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013.
2. The Bills were introduced into the House of Representatives on 14 November 2013. They give effect to the Government's *Policy to Improve the Fair Work Laws*, in which the Government committed to re-establish the Australian Building and Construction Commission to once again ensure the rule of law and productivity on building sites and construction projects, whether on-shore or off-shore.
3. It is intended the re-established Australian Building and Construction Commission will commence its operations on 1 January 2014.
4. The Bill is largely modelled on the *Building and Construction Industry Improvement Act 2005*.
5. The key provisions of the Bill provide for:
 - coverage of 'building work' which includes the off-site prefabrication of made-to-order components for parts of buildings, structures or works and the transport and supply of goods and materials directly to building sites to be used in building work;
 - the re-establishment of the Australian Building and Construction Commissioner and Commission, to replace the Fair Work Building Industry Inspectorate;
 - a Building Code, and a Work Health and Safety Accreditation Scheme for Commonwealth funded work;
 - prohibitions relating to unlawful industrial action, unlawful picketing, coercion and discrimination;
 - an enforcement regime including penalties for breaches of the Act and a broad range of remedies which may be accessed by affected persons or the Australian Building and Construction Commission. These penalties and remedies are modelled on the *Building and Construction Industry Improvement Act 2005*;
 - the power for the Australian Building and Construction Commissioner to compel witnesses to attend an examination or to produce documents where he/she reasonably believes that the person has information or documents relevant to an investigation into a suspected contravention of workplace relations laws, with those powers to be subject to certain safeguards to protect the rights of individuals;
 - the Commonwealth Ombudsman to monitor and review all examinations and provide reports to the Parliament on the exercise of this power; and
 - inspector powers, modelled on the powers provided to Fair Work Ombudsman Inspectors under the *Fair Work Act 2009*.

PURPOSE OF THE SUBMISSION

6. In this submission, the Department of Employment will provide detail on key aspects of the Bill and the Government's policy underpinning those aspects.

7. The submission will also respond to a number of issues that have been raised by various stakeholders preceding the Bill's introduction to the Parliament.

CONSULTATION

8. Exposure drafts of the Bill were circulated to and discussed with employer organisations and unions during confidential consultation sessions facilitated by the Department on 30 October 2013.

9. The Department also consulted with employer organisations and unions on the provisions of the Building and Construction Industry (Consequential and Transitional) Bill 2013 on 4 November 2013.

10. The Minister for Employment, the Hon. Eric Abetz, discussed the Bill with the Select Council on Workplace Relations at the meeting of 1 November 2013. The Minister will update the National Workplace Relations Consultative Council at the meeting of 25 November 2013.

11. The Government consulted on its policy while in Opposition ahead of the policy announcements in 2010 and 2013 to re-establish the Australian Building and Construction Commission.

12. The Minister was also informed by the *Taskforce to Re-establish the Australian Building and Construction Commission* and its report provided to the then Leader of the Opposition, the Hon. Tony Abbott MHR.

POLICY OBJECTIVES OF THE BILL

13. The construction industry provides many jobs for workers in both small businesses and large enterprises. It is critical to a productive, prosperous and internationally competitive Australia. The Government's second reading speech stated that it recognises the importance of an industry that is vital to job creation and essential to Australia's economic and social well-being.

14. The Government has stated that the need to re-establish the Australian Building and Construction Commission underpinned by provisions put in place in 2005 is clear.

15. The Government's stated view is that, as with the provisions of the *Fair Work Act 2009* relating to the textile, clothing and footwear sector, where certain industries face distinctive industrial relations challenges, special circumstances require special laws.

16. While the Australian Building and Construction Commission existed, the economic and industrial performance of the building and construction industry significantly improved. For example, a 2013 Independent Economics report¹ on the state of the sector during this period found that:

- building and construction industry productivity grew by more than 9 per cent;
- consumers were better off by around \$7.5 billion annually; and

¹ Independent Economics, *Economic Analysis of Building and Construction Industry Productivity: 2013 Update*

- fewer working days were lost through industrial action.

17. The main object of the Bill is to provide an improved workplace relations framework for building and construction work to ensure that it is carried out fairly, efficiently and productively for the benefit of all building industry participants and for the benefit of the Australian economy as a whole.

18. The Government has stated that a re-established Australian Building and Construction Commission will also better support workers by creating a workplace which is free of intimidation and bullying.

19. An object of the Bill is also to improve the bargaining framework so as to further encourage genuine bargaining at the workplace level. The Bill aims to promote respect for the rule of law and ensures respect for the rights of all building industry participants. The Bill contains provisions to ensure that unlawful action, including unlawful industrial action and unlawful pickets, is addressed. The Bill includes the ability for the courts to impose significant penalties for individuals and organisations that participate in unlawful action.

20. The Bill strengthens existing provisions for investigating and enforcing the law. The Australian Building and Construction Commissioner will be able to exercise their power to obtain information quickly and effectively. However, to ensure accountability and transparency, the use of these powers will continue to be reviewed and reported on by the Commonwealth Ombudsman.

21. The Government's second reading speech stated that it is committed to ensuring the rule of law is maintained. As the 2003 Royal Commission into the Building and Construction Industry (the Royal Commission) concluded, the behaviour often seen in the building and construction industry marks it as singular. It is an industry in which conventional standards of commercial and industrial behaviour do not apply.

AGENCY FUNDING

22. The Government's *Policy to Improve the Fair Work Laws* committed to re-establishing the Australian Building and Construction Commission to its former structure. To give effect to this, an additional \$5 million appropriation will be allocated to the re-established Australian Building and Construction Commission in 2013-14 rising to an additional \$10 million per annum in subsequent years.

BUILDING CODE

23. The Government's *Policy to Improve the Fair Work Laws* also states that the Australian Building and Construction Commission will administer a national code and commits to working with the state governments who have put in place their own codes to ensure consistency.

24. The Bill allows for the Minister to issue a Building Code.

25. The re-established Australian Building and Construction Commission will administer a new Building Code, which will govern industrial relations arrangements for Australian Government-funded projects. This will ensure that taxpayers' dollars are used efficiently.

26. A new statutory code is being developed, in consultation with both industry stakeholders and state governments, which is intended to commence at the same time as the re-established Australian Building and Construction Commission.

27. Several states have expressed the need to have their own stand-alone building code schemes and that these arrangements can provide substantial benefits in the management of procurement processes for state-funded building work. The Government has stated that its intention is for state-based codes to continue to operate alongside the new national code.

SUMMARY OF PROVISIONS

Commissioner

28. The Bill will re-establish the Australian Building and Construction Commission. It will be led by its Commissioner, who will have the functions under the Bill of monitoring, promoting and enforcing appropriate standards of conduct by building industry participants and referring matters to other relevant agencies and bodies as required.

29. The Australian Building and Construction Commissioner will be responsible for investigating suspected contraventions of the law by building industry participants. The Commissioner will also institute or intervene in proceedings in accordance with these laws and provide assistance and advice to building industry participants on their rights and obligations under designated building laws.

30. The Australian Building and Construction Commissioner will be supported by Deputy Commissioners, and by a statutory agency, to be known as the Australian Building and Construction Commission, comprising persons engaged under the *Public Service Act 1999*.

Definition of Building Work

31. The definition of building work in the Bill includes off-site prefabrication of made-to-order components for parts of buildings, structures or works.

32. The definition of building work also includes the transporting or supplying of goods directly to building sites to be used in building work. This is a change from the previous Australian Building and Construction Commission's underpinning legislation and is included to ensure that large resource construction projects cannot be indirectly disrupted through coordinated restrictions or bans on the supply of materials to those projects.

33. The Bill extends the definition of building work to the exclusive economic zone and waters above the continental shelf.

Re-instatement of Industry Specific Penalties

34. The Government's second reading speech states that changing the lawless culture of the building and construction industry requires strong regulation, a strong regulator and penalty levels that will act as a deterrent to unlawful behaviour.

35. The Bill provides for higher penalties and a deterrent to unlawful industrial action, unlawful picketing, and coercion and discrimination. These industry specific penalties were a key recommendation of the Royal Commission.

36. The Courts will determine the appropriate penalty to apply within the limits set out in the legislation as informed by considerations of proportionality.

Coercive Powers

37. The Bill enables the Australian Building and Construction Commissioner to compel witnesses to attend an examination or to produce documents where he/she reasonably believes that the person has information or documents relevant to an investigation into a suspected contravention of workplace relations laws.

38. These powers will ensure the Australian Building and Construction Commission is able to carry out its investigations effectively. The coercive powers in the Bill were recommended by the Royal Commission, which noted that the Australian Building and Construction Commission would “need to penetrate the veil of silence behind which many decisions to take unlawful action are hidden”.

39. The Bill also provides strong powers to Australian Building and Construction Commission’s inspectors, which have been effectively modelled on the powers granted to Fair Work Inspectors contained in the *Fair Work Act 2009*.

Safeguards

40. The Bill provides strong means for investigating and enforcing the law. To ensure accountability and transparency, the use of the coercive examination powers will continue to be reviewed and reported on by the Commonwealth Ombudsman.

41. The Bill requires the Australian Building and Construction Commissioner to provide the Commonwealth Ombudsman with a report about the examination along with a video recording and transcript of the examination. At the end of each financial year, the Commonwealth Ombudsman is required to prepare and present to the Parliament, a report about examinations during the year. This will ensure public transparency and accountability and give the community confidence in the work of the Australian Building and Construction Commission.

42. In recognition of the serious nature of the coercive powers, the Bill provides for use and derivative use immunity in relation to information obtained through the use of these powers. This ensures that information obtained cannot be used against the person in most criminal or civil proceedings.

43. The Bill provides that notices requiring individuals to attend an examination can only be issued with at least 14 days notice and that any person appearing is entitled to legal representation.

44. The powers under this act are similar to those granted to a range of other Commonwealth regulatory bodies such as the Australian Competition and Consumer Commission, the Australian Prudential Regulation Authority, the Australian Securities and Investment Commission, the Australian Taxation Office, Centrelink and Medicare. A comparison of the powers available to Centrelink and Medicare is at [Attachment A](#).

Payment of Reasonable Costs

45. The Bill provides that a person who attends an examination as required by an examination notice is entitled to payment for reasonable expenses incurred by the person in attending the examination. Reasonable expenses will cover matters such as travel and accommodation expenses.

46. The method for calculating the fees and allowances a person may be paid will be prescribed by the rules, as made by the Minister. A person will only be entitled to reasonable expenses. To that end, the rules will prescribe maximum amounts that are payable in relation to travel or accommodation expenses rather than guaranteeing payment of all expenses actually incurred by a person.

47. During consultation on the Bill, stakeholders were supportive of including provision for the reimbursement of reasonable costs associated with attendance at an examination.

Right to Legal Representation

48. The Bill provides that where a person has been required to attend before the Australian Building and Construction Commissioner or before an assistant, the person may be represented by a lawyer if the person chooses. This ensures that the person in question is not disadvantaged and is able to be appropriately supported.

49. The time for an examination to take place must be at least 14 days after the notice is given, ensuring that the person on whom the notice is served will have an adequate opportunity to seek advice and arrange legal representation if they so choose.

Unlawful Behaviour

50. The Bill aims to address unlawful behaviour and there are significant penalties for taking unlawful industrial action, or for engaging in, or organising, an unlawful picket.

51. The Bill provides that a person must not organise or engage in an unlawful picket. This was not a feature of any predecessor Acts and has been included in the Bill to address the disruptions to the building industry caused by picketing. Picketing will be unlawful under the Bill if it is motivated by one of the purposes set out in the Bill or is otherwise unlawful. Action that seeks to draw attention to a social, environmental or community issue, for example, will not be unlawful unless the action involves unlawful behaviour such as trespass.

52. The Bill also reinstates civil remedy provisions in relation to coercion and discrimination and makes it clear that project agreements are unenforceable where the intention is to secure standard employment conditions relating to a particular site or sites covering employees from different enterprises. These types of project agreements inhibit genuine enterprise bargaining.

Federal Safety Commissioner and the Australian Government Building and Construction WHS Accreditation Scheme

53. The Government has stated that it will use its influence as a funder of large building and construction projects nationally to lead the way on improving work, health and safety standards and culture throughout the building and construction industry.

54. For this reason, the Bill retains the role of the Federal Safety Commissioner and the *Australian Government Building and Construction Industry WHS Accreditation Scheme*.

HUMAN RIGHTS AND INTERNATIONAL LABOUR ORGANISATION

55. The Government has stated that the measures introduced by the Bills are necessary, reasonable and proportionate and that they contain appropriate and effective safeguards to ensure due process and transparency.

56. The Government has stated that there is a demonstrated need for effective, industry-specific regulation to ensure the rights and obligations of building industry participants, including employees, employers, contractors and their representatives are respected.

TRANSITIONAL AND CONSEQUENTIAL PROVISIONS

57. The key provisions of the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 will:

- repeal the *Fair Work (Building Industry) Act 2012*;
- make minor consequential amendments to Commonwealth legislation that are relevant to the operation of the Building and Construction Industry (Improving Productivity) Bill 2013; and
- make transitional provisions for: changes of names of institutions and offices; preserving the appointments of senior position holders; preserving the employment entitlements of staff of affected organisations; preserving the confidentiality of certain information; the timing of reports; preserving the existing safety accreditation scheme; preserving examination notices and their effect; legal proceedings and other related matters.

| Type of power | Reasons for use | Power used against/Legal Representation | Limitations | Who has the power | Contents of notice | Notice period | Privilege against self-incrimination | Legal professional privilege | Review rights |
|---|---|---|--|---|--|----------------------------|--|--|---|
| MEDICARE | | | | | | | | | |
| <i>Human Services (Medicare) Act 1973, s 8P</i> | | | | | | | | | |
| Provide information, produce documents | Reasonable grounds for believing an offence has been or is being committed and that information or document is relevant | A person/Not provided for in the legislation | Not required to produce records containing a patient's clinical details (s 8P(3) subject to exceptions (s 8P(4)) | An authorised officer | Specify time, manner and officer for providing information or time and place for giving evidence (s 8Q) | At least 14 days (s 8Q) | Not available. But can use immunity for evidence or information in criminal proceedings (s 8S) | Reasonable excuse defence (s 8R). No specific abrogation of the privilege | Review of a decision to issue a request for information available under the AD(JR) Act |
| CENTRELINK | | | | | | | | | |
| <i>Student Assistance Act 1973, s 345 (example only)</i> | | | | | | | | | |
| Provide information, produce documents | Secretary believes person may have information or document relating to debtor to the Commonwealth | A person/Not provided for in the legislation | Information must be relevant to financial situation or location of a debtor | Secretary | Specify time, manner and officer for providing information or time and place for giving evidence (s 347) | At least 14 days (s 347) | Reasonable excuse defence (s 347). No specific abrogation of the privilege | Reasonable excuse defence (s 347). No specific abrogation of the privilege | Not reviewable by SSAT (s 313). Review by Secretary if satisfied of sufficient reason to review (s 303) Review of a decision to issue a request for information available under the AD(JR) Act |
| AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION | | | | | | | | | |
| <i>Building and Construction Industry (Improving Productivity) Bill 2013, s61</i> | | | | | | | | | |
| Provide information, produce documents | ABC Commissioner reasonably believes person has information or documents relevant to an investigation or suspected contravention the Act or a designated building industry law by a building industry participant | A person/Legal representation permitted by the Bill | Information must be relevant to an investigation or suspected contravention | ABC Commissioner, Deputy ABC Commissioner, SES employee if no Deputy Commissioner appointed | Specify time, manner and officer for providing information or time and place for giving evidence (s 61(2)) | At least 14 days (s 61(2)) | Not available. But can use immunity for evidence or information in criminal proceedings (s 90) | No specific abrogation of the privilege | Not specified, however Commonwealth Ombudsman to review the exercise of powers and report to the Parliament |