

Submission

To

**Senate Education Employment and Workplace
Relations and Standing Committee**

on

***Inquiry into the Building and Construction
Improvement Amendment (Transition to Fair Work)
Bill 2009***

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BACKGROUND

1. The Electrical and Communications Association (ECA) is the peak industry body for contractors who operate in the electrical, data, communications and fire sector of the Building and Construction and domestic services industry in Queensland.
2. ECA is an industrial organisation of employers registered in the Queensland Industrial Relations Commission and is transitionally registered in the Australian Industrial Relations Commission.
3. The electrical contractor is second only to the principle contractor (builder) on site in terms of percentage of work performed and dollars generated by our sector of the industry, but unlike the builder the electrical contractor can find themselves working in any of eleven different areas, or types of workplaces throughout their normal working day.
4. ECA membership is over 1,850 (with approximately 85% defined as constitutional corporations) and is as diverse as the industry it represents, ranging from many small “Mum and Dad” businesses that employ only one or two people, right up to large multinational companies who employ more than 1,500 electricians in Queensland alone.
5. The Association is appreciative of the opportunity to submit its views on the Bill, and while ECA is mindful of the fact that the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009* (the ‘Bill’) is placing into the House the Government’s policies leading up to the last election, it is concerned that some aspects of the Bill if passed as it currently reads, would be detrimental to its members.
6. As such ECA’s submission will not focus on the Bill as a whole, but target certain sections of the Bill which we believe will make operating an electrical business in Australia more difficult in the commercial sector of the building and construction industry.

ECA SUBMISSION

Removal of industry specific laws regarding industrial action, coercion and discrimination and the higher penalties

7. ECA believes the specific legislation for the building and construction industry should remain. During times of economic growth and recession the building and construction industry one of Australia's driving forces in terms of employment and economic stimulus. This has been particularly evident over recent years.¹
8. A report by Econtech Pty Ltd into the productivity levels in the building and construction industry linked the dramatic decrease in days lost due to industrial action to an increase in productivity. This was particularly evident in a study on the Eastlink project² where there was a significant financial advantage when the project operated under post WorkChoices/ ABCC industrial relations reforms.³
9. During times of global economic uncertainty Australia needs to maintain the high productivity levels as previously experienced in the building and construction industry as a result of industry significant legislative reforms.
10. One of the most significant reforms introduced under the *Building and Construction Industry Improvement Act 2005 (Cth)* (BCII Act) was the significant penalty to individuals, organisations and/or constitutional corporations if they were found guilty of breaching Chapter 5 of the BCII Act.
11. A penalty is defined as a "punishment or sanction imposed for unlawful conduct for example, imprisonment or a punditry penalty".⁴ ECA believes that the significance of the penalty should be based on the nature and severity of the unprotected industrial action.
12. Specifically the harshness of the penalties should be linked to the significant costs principal contractors, employers and other affected industry participants suffer when unlawful industrial action is taken.
13. In the recent case of *Alfred v Wakelin, O'Connor, CFMEU, AWU and AWU(NSW)*⁵ the Federal Court found that the AWU and one of its delegates took unlawful industrial action at

¹ Economic Analysis of Building and Construction Industry Productivity: 2008 Report prepared for the Office of the Australian Building and Construction Commissioner by Econtech Pty Ltd, 30 July 2008, pp24-5.

² Ken Phillips, *Industrial Relations and the struggle to build Victoria*, Institute of Public Affairs, Briefing Paper, November 2006.

³ Economic Analysis of Building and Construction Industry Productivity: 2008 Report prepared for the Office of the Australian Building and Construction Commissioner by Econtech Pty Ltd, 30 July 2008, p iii.

⁴ Butterworths Concise Legal Dictionary 3rd Edition.

the Lake Cowal gold mine site in October and November 2005. The Court handed down a total of \$55 000 in penalties to the AWU and its delegate. Acting ABC Commissioner Ross Dalgeish stated “*These strikes involved nearly 300 workers on each occasion and caused estimated losses of \$200 000*”.⁶

14. In *Cruse v CFMEU & Anor*,⁷ the Court ordered the CFMEU and its official to pay penalties for engaging in strike action. While the company Roche Mining (JR) Pty Ltd stated that the costs incurred as a result of the strike was \$330 000.
15. The significant penalties reflect the seriousness and ramifications of unlawful industrial action on a business and the economy.
16. ECA submits that the evidence and case law presented demonstrates the continual need for the building and construction industry to maintain industry specific laws particularly with regards to the laws governing industrial action and higher penalties for breaches. This is particularly important given the current economic climate in both Australia and abroad.

Establishing the Independent Assessor

17. ECA understands that the Bill allows for the new coercive power provisions to be ‘switched on’ and ‘switched off’ on projects commencing on or after 1 February 2010. Parties who have an interest in the project will be able to apply to the Independent Assessor – Special Building Industry Powers to have the project exempt from investigations by the Inspectorate Director.
18. The term ‘interested parties’ need to be defined. ECA submits that ‘interested parties’ should be defined as the parties who have a direct interest in the operational and financial functions of the project. That is, parties who will incur a direct financial loss as a result of any unlawful industrial practices that would have fallen within the jurisdiction of the Inspectorate Director. This would ensure only parties with a genuine interest in the project could apply for the exemption. ECA is concerned that parties, such as unions, will seek to apply for the exemption. ECA can think of no rational reason why the provisions should be ‘switched off’. If all parties operate within the parameters of the law then the coercive powers will not be required.

⁵ [2009] FCA 267 (26 March 2009) .

⁶ ABCC Media Statement “\$55 000 penalties for AWU unlawful industrial action”, March 2009.

⁷ [2007] FMCA 1873 (14 November 2007).

19. The Minister has said these exemptions can be overruled if there is any outbreak of unlawful activity on the site.⁸ The Government is yet to release the regulations that will detail the factors for the Independent Assessor to take into account when determining whether to ‘switch off’ the coercive powers. ECA submits that industry stakeholders should be involved in the drafting of the regulations to ensure all relevant factors are considered particularly when determining the factors for the Independent Assessor to take into account when determining whether to ‘switch off’ the coercive powers.
20. A set criterion should be developed for determining the projects that will receive the exemption. According to the Workplace Relations Minister the ‘switch off’ mechanism of coercive powers will be available to new projects with good industrial records. ECA submits that the term ‘good industrial records’ is a very broad term that would need to be clearly and concisely defined. ECA believes all stakeholders, including regulators, industry associations and unions, should be involved in the development of the criterion to ensure the relevant information and to achieve a greater understanding of requirements and ensure an effortless transition. This said ECA is of the belief that there would still be too much ambiguity in the criteria and retaining the power on all sites would protect all stakeholders

Inspectorate Director and use of coercive powers

21. The Bill requires the Inspectorate Director to apply in writing to a presidential member of the Administrative Appeals Tribunal (AAT) for the issue of an examination notice requiring a person to give information, produce documents or attend to answer questions before the Inspectorate Director.
22. ECA submits that it is important for any law to have ‘checks and balances’ particularly when individuals rights may be infringed. However, the ability for Government Departments or agencies to gather evidence and conduct investigations should not be hampered or staled by putting up too many barriers or ‘red tape’. The Bill provides that when determining whether an examination notice will be issued a presidential member of the AAT must consider whether certain conditions have been satisfied. These include:
- There are reasonable grounds to believe that the person has information or documents, or is capable of giving evidence, relevant to the investigation;
 - Other methods of obtaining such information or documents have been unsuccessful or are inappropriate.

⁸ *The Australian Financial Review*, ‘Warning over coercive power’, Thursday 2 July 2009; p9

The term ‘reasonable grounds’ can be ambiguous and may be inconsistently interpreted which can increase the difficulty for the Inspectorate Director to gather sufficient evidence to support the request for the issue of an examination notice to the AAT. The relevant legislative provisions should be clear and concise to enable all parties, to potential investigation(s), to understand their rights and obligations.

Coercive Powers

23. The coercive power provisions relate to compulsorily obtaining documents from a person who the Director believes has information or documents relevant to an investigation under the Bill. The Bill also provides for greater protections for persons who are being investigated and where coercive powers are being used.
24. These provisions in the Bill are similar to the subpoena process under the *Uniform Civil Procedure Rules 1999 (Qld)* (the ‘UCPR’) whereby the person summonsed for examination will be reimbursed for their reasonable expenses, and not requiring a person to disclose documents protected by legal professional privilege. ECA submits that if the Bill is implemented into legislation in its current form that provisions are made to determine ‘reasonable expenses’ and define legal professional privilege. This will ensure that parties operate within the intention of the law.
25. The use of coercive powers under the BCII Act has received much attention both positive and negative. ECA submits that the use of such power is necessary as the level of fear and intimidation that was prevalent in the industry prior to the ABCC was palpable, with only those with “nothing to lose” speaking out. Those that did go public with information were treated harshly, with some small businesses losing everything. In order to obtain information relating to breaches of the code and of the law the legislation had to provide coercive powers so that the truth could be discovered.
26. The use of coercive powers is not only used in the building and construction industry. The Hon Robert McClelland tabled the report into the coercive powers used by various agencies. The ‘*The Coercive Information-gathering Powers of Agencies*’ (the ‘report’) investigated the coercive powers practiced by six agencies.⁹

⁹ These included Centrelink, Medicare Australia, the Australian Securities and Investments Commission, the Australian Prudential Regulation Authority, the Australian Taxation Office and the Australian Competition and Consumer Commission.

27. In all of the cases investigated in the report, the trigger for the use of coercive powers was ensuring compliance with the legislation, and the investigation to certain alleged or suspected contraventions of legislation.
28. The Report outlines a set of principles government agencies should follow to ensure the coercive information gathering powers are used fairly and efficiently. The first principle is that the person exercising this statutory right must have 'reasonable grounds' based on a belief or suspicion that such a power needs to be exercised.¹⁰ Section 52 of the BCII Act provides for a process to be followed by the ABC Commissioner when exercising their powers when they reasonably suspect a person has information, documentation or evidence that is relevant to an investigation.
29. One principle in the Report states that legislation should outline who may authorise the exercise of an agency's coercive information-gathering powers.¹¹ Section 52 (1) of the BCII Act states that the ABC Commissioner authorises the use of these powers. Under this provision the power to authorise is not delegated and the ABC Commissioner would be accountable for any abuse of this power.
30. In the interest of natural justice section 52 (3) of the BCII Act provides that any person attending before the ABC Commissioner is entitled to legal representation. This right has been specifically stated in the BCII Act to ensure all person(s) are aware of their rights when giving information, producing documents and/or attending before the ABC Commissioner.
31. ECA submits that the current provisions regarding the use of coercive powers provides sufficient protection of individual rights and clearly states the intentions, obligations and responsibilities of all parties involved in investigations. Based on the evidence presented ECA believes the current laws should be reflected in the Bill.

Maintaining current penalties for failure to give required information at an examination

32. ECA supports the Government's decision to maintain the current penalties for failure to give required information at an examination. It is in the spirit of the legislative for all parties to be honest and cooperative during investigations.

¹⁰ Administrative Review Council 'The Coercive Information-Gathering Powers of Government Agencies' Report no. 48, May 2008, p xi.

¹¹ Administrative Review Council 'The Coercive Information-Gathering Powers of Government Agencies' Report no. 48, May 2008, p xiii.

ECA CONTACTS

33. The Electrical and Communications Association would like to thank the Senate Committee for the opportunity to tender its submission to the Inquiry into the *Building and Construction Improvement Amendment (Transition to Fair Work) Bill 2009*
34. Should the Committee have any queries on any issues raised in this submission please contact either Mr Paul Daly or Ms Angela Szczepanski on 07 3251 2444.