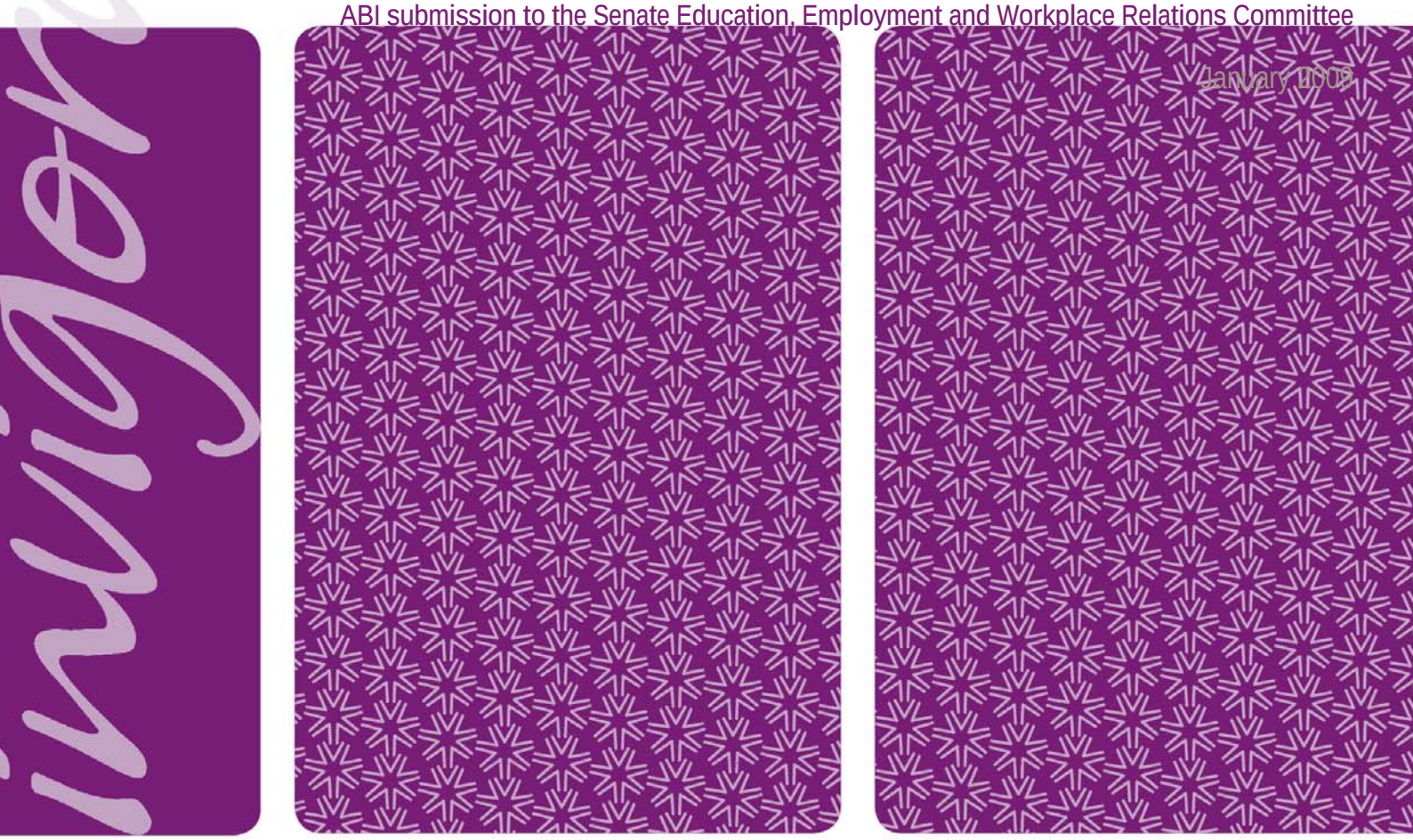
Australian Business Industrial

Inquiry into the Building and Construction Industry Improvement Amendment (Transitional to Fair Work) Bill 2009

ABI submission to the Senate Education, Employment and Workplace Relations Committee

January 2009



Invigorating Business Representation

Introduction

Australian Business Industrial (ABI) would like to thank the Senate Education, Employment and Workplace Relations Committee for the opportunity to comment on the Building and Construction Industry Improvement Amendment (Transitional to fair Work) Bill 2009. ABI wishes to constructively engage with the Government to ensure as orderly a transition as possible without losing ground in effort to bring about positive cultural change in the industry.

ABI is the registered industrial relations affiliate of NSW Business Chamber, and is responsible for NSW Business Chamber's workplace policy and industrial relations matters.

It is also a Peak Council for employers in the NSW industrial system and a transitionally registered organisation under the *Workplace Relations Act 1996*, and regularly represents members in both the Australian Industrial Relations Commission and Industrial Relations Commission of New South Wales.

ABI is a successor to the Chamber of Manufacturers of NSW which was established in 1886 to promote the interests of its members in trade and industrial matters. The Chamber was registered in 1926. Since its inception the Chamber and its successor industrial organisations have played a major representational role in industrial relations in NSW.

NSW Business Chamber is an independent member-based company, and is the largest business association in NSW. Through its membership and affiliation with 129 Chambers of Commerce, NSW Business Chamber represents over 30 000 employers throughout NSW.

ABI in conjunction with NSW Business Chamber represents the interests of not only individual employer members, but also other Industry Associations, Federations and groups of employers who are members or affiliates.

ABI Council, which comprises elected representatives of its membership, has had an opportunity to review the issues raised in this paper with respect to the Bill. This submission is reflective of the opinions and recommendations endorsed by the Council.

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Summary of Recommendations

The *Building and Construction Industry Improvement Amendment (Transition to fair Work) Bill 2009* (the Bill) proposes to amend and rename the *Building and Construction Industry Improvement Act 2005* (the BCII Act).

Building Code

To date the power under the BCII Act to issue a building code has not been exercised. The Bill does not propose to rescind this power. ABI supports the code being issued as a building code for the purposes of the Act.

> Subject to the enacted form of the Bill, the Minister favourably consider declaring the Code as the Building Code for the purposes of the Act.

Intervention in proceedings

The Bill proposes a new office, the Director of the Fair Work Building Industry Inspectorate, which is an approximate substitute for the current Australian Building and Construction Commissioner (ABCC). The Director's powers are not the same as those of the ABCC.

> The Government consider providing the Director with a power to intervene in proceedings.

Supervision of the Director

The Bill proposes that the Director apply for an examination notice in situations where the special powers to obtain information, evidence or documents are required. The Assigned member considering such applications must have regard to a number of factors, some of which are to be prescribed by regulation.

> The Government reassess its approach to oversight and direction of the Director and inspectorate. The Minister's powers should be not be expanded beyond the existing powers under the BCII Act. The main scrutiny of the Director's powers should be by way of Parliamentary consideration of the annual report.

Factors associated with applying for examination notices

The Bill proposes that the Director apply for an examination notice in situations where the special powers to obtain information, evidence or documents are required. The Designated Member of the AAT considering such applications must have regard to a number of factors, some of which are to be prescribed by regulation.

> The Government consider
>
> - enacting (rather than regulating) requirements to be taken into consideration in considering an examination notice

- not proceeding with requiring consideration of "undue impact". "Undue impact" is highly subjective and also it is difficult to see how sensible information about this can be ascertained by either the Director or designated member.

Material obtained under an examination notice

The Bill closely confines what can be investigated under an examination notice, including the investigations which are subject to the notice.

> The Government consider clarifying that discovery of unexpected, or unknown, information or documents under an examination notice not constitute a breach of the notice. If it is required to obtain further information, evidence or documents associated with the hitherto unknown possible breach, the fact they came to light under an existing examination notice not constitute a barrier to obtaining an examination notice for the new investigation.

The Independent Assessor

The Bill proposes a new office, the Independent Assessor - Independent Assessor - Special Building Industry Powers which is empowered to determine that a project would not be subject to applications to obtain examination notices to further any investigation affecting it.

> The Government reconsider providing for the Independent Assessor - Special Building Industry Powers or the capacity to "switch off" the special investigation powers. This is ABI's preferred outcome.

Switching-off the special powers - Who is interested and what should be considered?

The Bill proposes that what the Assessor should consider in addressing an application is partly prescribed by regulation. It seems likely that behaviour on the project, but not past behaviour, or contemporaneous behaviour on other projects, will be prescribed. As well, it seems likely that the Assessor will have to seek the view of other interested persons when considering an application.

> If "switching-off" is retained, the Government consider broadening the consideration of behaviour to include the consideration of past behaviour and behaviour on other projects.
> An "interested person" in this instance should be confined to persons with a direct contractual interest, or in the case of unions, with members engaged on the project, or if there is a greenfields or other project agreement, unions covered by the agreement.
> The process might be facilitated if the gazettal of the application identifies who is an "interested person" for the purposes of commenting on the application and providing a date by which submissions must be made (or a hearing date).

Switching-off the special powers - When the provision commences

The Bill proposes that the capacity to apply to the Assessor to switch-off special powers from a project should start from the day the section comes into effect for projects where no on-site work has commenced.

> If "switching-off" is retained, the Government might consider allowing the capacity to "switch-off" to apply to projects which were the subject of an expression of interest or tender let for the first time on or after 1 February 2010. The building project would be defined by the scope of the contract and the date

is certain. Respondents to the call for an expression of interest or tenderers would act knowing which rules apply.

- The Government might also consider clarifying that a determination could be issued with a finite life or be geographically confined. If this were adopted, neither limitation would of itself prevent extension or renewal in appropriate circumstances

Switching-off the special powers - Who can apply?

The Bill proposes that the Minister and any interested person can apply to the Assessor to have the special powers switched-off. An interested person is to be prescribed by regulation. It seems likely that interested person will include any building industry participant associated with the project.

- If "switching-off" is retained, the Government might reconsider doing away with the capacity for an "interested person" to apply to have powers "switched-off" and confining applications to the Minister. Confining the right to apply to the Minister would also obviate the need for the Minister to be able to require a report relating to the Assessor's functions and powers in a particular matter. If the Government is not minded to restrict application rights to the Minister it might consider restricting applications to the head contractor(s) of the building project(s).the Director with a power to intervene in proceedings.

Switching-off the special powers - Providing greater certainty to projects

The Bill proposes that the Minister or an interested person can apply to the Assessor at any time to have the special powers switched-off.

- If "switching-off" is retained, and "interested person" is not significantly restricted, the Government might reconsider allowing applications to be made at any time. Possible limitations include
    - allowing only one "switching-off" application on a particular building project;
    - restricting "switching-off" applications to building projects which are subject to the Implementation Guidelines
    - confining "switching-off" applications to building projects above a certain value.
    - intervene in proceedings.

Switching-off the special powers - When access to the special powers should cease

The Bill proposes that examination notices, and therefore the special powers, not be available after 5 years.

- The Government consider making the proposed automatic sunset rescission of the power to apply for examination notices subject to a public review to ascertain whether there is a need to retain the capacity.

Requiring confidentiality

The Bill proposes that the Director cannot require an interviewee under an examination notice to not disclose information about the interview.

> The Government re-consider this provision.

Refusal to provide information

The Bill proposes that a person subject to an examination notice may refuse disclosure if the person can make out legal professional privilege or public interest immunity.

> The Government re-consider this provision.

These are the submissions by Australian Business Industrial (ABI) to the Senate Education, Employment and Workplace Relations Committee which is inquiring into the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009* (the Bill). The Bill is intended to amend and rename the *Building and Construction Industry Improvement Act 2005* (the BCII Act).

ABI thanks the Committee for the opportunity to make submissions about the Bill.

Background

The BCII Act legislates both occupational health and safety and workplace relations matters in the industry. The bulk of the Bill addresses workplace relations matters. The Bill has been drafted following a report by Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction Industry*, which was commissioned by the Government. The Bill adopts a number of recommendations in that report but is not confined to the report or its recommendations.

Mr Wilcox issued a discussion paper as part of his consultation process and was at pains to show that a wide variety of possibilities was on the table. He commenced by stating:

> "Many people, especially in the union movement, believe there is no need for a special body to police the building and construction industry. They argue building workers and building employers should be subject to the same set of rules as their colleagues in other industries; no more and no less. They say special laws, especially coercive laws, are inherently discriminatory. They contend that, if there is a need to tighten the enforcement of workplace laws, that should occur across the board; the tightening applying to all employers and employees.
>
> I will, in my report, convey to the Minister my perception of the degree of support for this view. However, it is important to recognise that, for me, there is no question as to whether or not there will be a Specialist Division of the FWA Inspectorate. Consistently with the Government's pre-election policy statements, my Terms of Reference assume there will be such a division […]. Of course, the argument about discrimination is important to consideration of the law relating to the proposed Specialist Division of FWA, and its functions and powers. I will consider it in that context.
>
> While I must assume there will be a Specialist Division, that is the only given. The form, functions and powers of the Specialist Division are all open to debate. Also open to debate is the law that the Specialist Division will be required to enforce. For example, should it continue to be the case that building workers automatically expose themselves to significant civil penalties (fines) if they engage in any industrial action, other than narrowly defined "protected action" or on health and safety grounds?"[1]

ABI does not subscribe to the view that the building and construction industry is just another industry. The evidence is against such a view. Unlike most industries, a number of inquiries

[1] P3 Proposed Building and Construction Division of fair Work Australia - Discussion Paper

have been held into the building and construction industry over the years. The industry has been subject to a sustained regime of codes of practice directed towards ameliorating behaviour and relations within it.

The Gyles Royal Commission into Efficiency and Productivity in the Building Industry in NSW finally reported in May 1992, finding illegal and unproductive practices. The Royal Commission had issued interim reports and recommendations including recommending the establishment of a Building Industry Taskforce to consider charges arising out of what the Royal Commission had found, and to investigate matters not pursued or incompletely pursued by the Royal Commission.[2] In his opening address, Mr Green QC said:

> "To put it mildly, Commissioner Gyles returned an adverse verdict upon the building industry in NSW. He made many findings of illegal practices and conduct in the industry, as well as findings of intimidation and violence, having an adverse effect on efficiency and productivity within the industry."[3]

The BIT was set up in 1991 and later abolished in June 1995 following a change in government.

> In a paper delivered on 4 September 1995 entitled "The Commission perspective", Mr Gyles QC (who did not deliver the paper himself) wrote:
>
> > "… I did recognise … that the cathartic effect of the Commission itself would be beneficial. Exposure of the problem in detail, and the exposure of the activities of many participants in the industry, would inevitably lead to a good deal of self help and rethinking by many including clients.
> > …
> > In my view, what was required was no more or no less than a cultural change on the part of the major participants in the industry. A significant period of normality was required where the law was observed and ordinary standards of commercial morality maintained. This would give a generation experience of working in an environment where concentration could be upon civilised arrangements between participants in the industry with a view to the efficient management of projects rather than confrontation in industrial relations and in relations between contractor and subcontractor and between contractor and client."[4]

In July 1996 the NSW Government issued a Code of Practice for the Building Industry (revised from a Code originally issued in 1992) addressing relationships between the parties on state government funded jobs. Subsequently the *National Code of Practice for the Construction Industry 1997* (Code) was agreed by all governments (federal, state and territory) to apply to their government funded projects. The Code left open the capacity for individual governments to implement it as appropriate to their own jurisdiction.

The Royal Commission issued its final report in February 2003. It found

> "…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. The findings indicate an urgent need for structural and cultural reform." [5]

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[2] P8, para 30, Royal Commission into the Building and Construction Industry, Green QC, Opening Address: NSW
[3] P7, para 29, *ibid*
[4] P10, para 42, *ibid*
[5] P6, para 16, Final Report of the Royal Commission into the Building and Construction Industry - Summary of Findings and Recommendations, Vol 1

NSW was not found to be conspicuously different from the industry in the rest of Australia.[6] Importantly, a decade had elapsed since the Gyles Royal Commission, but positive cultural change had not embedded.

In December 2003, the Federal Government issued implementation guidelines, *The Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry* (Guidelines).

These have been amended a number of times. In June 2006 the Federal Government re-issued the Guidelines expanding the Code's existing reach into materials suppliers. The Guidelines apply to those tendering, including materials suppliers, for Federal Government funded work[7] but also require "Code-compliance" (compliance with the Code and the Guidelines) on the tenderer's other non-government jobs. The most recent re-issue, starting 1 August, will apply to projects which were the subject of an expression of interest or tender let for the first time on or after 1 August 2009. The re-issue has excised materials suppliers from the reach of the Guidelines.

Following the recommendations of the Cole Royal Commission the Federal Government introduced special legislation. The BCII Act established the Australian Building and Construction Commissioner (ABCC) and the Federal Safety Commissioner.

The ABCC's role is to monitor, promote, investigate and enforce appropriate conduct by those engaged in building work. Its jurisdiction includes compliance with industrial instruments, the *Workplace Relations Act 1996* and the *Independent Contractors' Act 2005* (called "designated building laws"), and a statutory "building code" issued under the BCII Act.

No statutory "building code" has ever been declared under the BCII Act, although the Minister[8] has that power. Under contract conditions attached to federal government funded projects, the ABCC has extensive powers concerning participants' behaviour including compliance with the Code.

Under the Bill the Minister retains the capacity to issue a building code [the Bill does not propose any amendment to s 27 BCII Act]. The proposed Director of the Fair Work Building Inspectorate has the function of enforcing the building code [proposed s 10(b) of the Bill].

Recommendation
Subject to the enacted form of the Bill, the Minister favourably consider declaring the Code as the Building Code for the purposes of the Act.

In his report Mr Wilcox accepted that there are special features in the industry which merit a specialist regulator, and that the ABCC had made a positive difference to the quality of site

[6] See for example, P P2, para 4, Royal Commission into the Building and Construction Industry - First Report, or P5, para 15, Final Report of the Royal Commission into the Building and Construction Industry - Summary of Findings and Recommendations, Vol 1
[7] Government departments and agencies under the *Commonwealth Authorities and Companies Act 1997*; funding includes joint funding where the Commonwealth has funded at least $M5 and 50% or where it has funded at least $M10.
[8] The ABCC treats the *Code* and the *Guidelines* as the building code for its purposes and applies it to employers undertaking building work which are constitutional corporations or in a "commonwealth place".

relationships, if not to industry productivity. In that context, he examined the differences between the BCII Act and the *Fair Work Act 2009* (FW Act) and isolated four key differences.

1. Under the FW Act there are civil penalties for organising or engaging in industrial action prior to the nominal expiry of an agreement. Under the BCII Act there are civil penalties for engaging in unprotected industrial action (action prior to the nominal expiry date gives rise to unprotected industrial action, but there are other causes as well).
2. The difference in penalties flows into access to damages. Where there is a civil penalty (industrial action prior to nominal expiry [FW Act]; unprotected industrial action [BCII Act]) the court can also award damages. Under the FW Act it would still be possible to bring a civil action for damages arising from unprotected industrial action because industrial action needs to be protected to have immunity from civil action (but damages do not flow from proceedings for a penalty).
3. Maximum penalties under the FW Act ($33,000 - corporation; $6,600 - individual) are less than 1/3rd of those under the BCII Act ($110,000 - corporation; $22,000 - individual).
4. Differences in the language of the FW Act and BCII Act may mean there are technical changes to aspects of the BCII Act if it is replaced by the FW Act.

Mr Wilcox was not persuaded that any of these differences should remain. In ABI's view Mr Wilcox has under-valued the importance of deterrence, and its role in promoting cultural change over time. It seems clear from recent cases that normal respect for the law is not yet established in the industry. Even if there is a case to "normalise" the scope of unlawful industrial action there seems a strong case to retain the higher penalty regime.

In summary Mr Wilcox recommended:

1. There should be a specialist building and construction division (BCD) located in the Office of the Fair Work Ombudsman (FWO), with separate operational staff (including inspectors), except perhaps in remote areas, and its own budget line and performance outcome, operating under a Director appointed by the Minister with an advisory board comprising the FWO, the Director and industry practitioners appointed by the Minister.
2. A new division of the FW Act should provide for the BCD. The BCD's coverage should be "building work" as defined by the BCII Act, excluding off-site work. The Director should have the same powers as the FWO including for the investigation and prosecution of suspected unlawful activity by any "building industry participant".
3. The FW Act provisions regulating the conduct of employers, employees and associations and penalties should apply in place of the BCII Act.
4. The Director should have the power to compel attendance for interrogation (compulsory interrogations), with the following conditions
    - notices to attend to be issued by the Administrative Appeals Tribunal (AAT) on the basis it is satisfied that
        - the division has commenced investigating a suspected contravention of the FW Act, and industrial instrument, a state or commonwealth industrial law
        - there are reasonable grounds to suspect the person has relevant information or documents
        - the information or documents is likely to be important to the investigation

- in light of options for obtaining the information and the impact on the person it is reasonable to issue the notice;
  - the Director, or Deputy Director, preside over all compulsory interrogations;
  - the Commonwealth Ombudsman (CO) monitor all compulsory interrogations and the Director is to
    - notify the CO of the issue of notices
    - supply a report to the CO, including a video recording and transcript;
  - the CO to report annually to parliament.

The power to compel compulsory conferences to be reviewed after 5 years and the legislation allowing it to have a 5 year life.

4. Those attending compulsory interrogations should receive expenses (including legal) and loss of wages and the rules of client legal privilege and public interest immunity should apply.

The Bill

Chapter 1 of the BCII Act contains the object and definitions. The Bill (items 2 - 49) proposes to alter the object, amend or delete a number of definitions and to insert others. There are significant changes proposed to the object.

Building and Construction Industry Improvement Act 2005	*Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009*
3. Main Object of Act	3. Object of this Act
(1) The main object of this Act is to provide an improved workplace relations framework for building work to ensure that building work 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.	The object of this Act is to provide a balanced framework for cooperative, productive and harmonious workplace relations in the building industry by:
(2) This Act aims to achieve its main object by the following means:	
(a) improving the bargaining framework so as to further encourage genuine bargaining at the workplace level;	(a) ensuring compliance with workplace relations laws by all building industry participants; and
(b) promoting respect for the rule of law;	(b) providing information, advice and assistance to all building industry participants about their rights and obligations; and
(c) ensuring respect for the rights of building industry participants;	(c) providing an effective means of enforcing those rights and obligations; and
(d) ensuring that building industry participants are accountable for their unlawful conduct;	(d) providing appropriate safeguards on the use of enforcement and investigative powers; and
(e) providing effective means for investigation and enforcement of relevant laws;	(e) improving the level of occupational health and safety in the building industry.

(f) improving occupational health and safety in building work;
(g) encouraging the pursuit of high levels of employment in the building industry;
(h) providing assistance and advice to building industry participants in connection with their rights and obligations under relevant industrial laws.

The new object places no explicit weight on the industry's place in the wider economy.

One of the key features of the Bill is the extent to which the powers which currently may be exercised by the ABCC are to be confined. Chapter 2 of the BCII Act which establishes the ABCC is to be repealed. The Bill proposes to replace it by a new Chapter 2 establishing the proposed Director of Fair Work Building Inspectorate.

Under the Bill the Director will no longer have the function of intervening in proceedings.

This seems a strange restriction since it suggests that where the Director is in possession of relevant information to a matter (for example, proceedings arising from an application for a bargaining order) that the information should not come before Fair Work Australia. It seems unlikely that one of the parties to the proceedings (who would need to be aware of the information) would call the Director as a witness (and would also want to be seen to call the Director).

This proposed restriction on intervention sits oddly with the Object of "…ensuring compliance with workplace relations laws by all building industry participants." [proposed s 3(a) of the Bill].

Recommendation
The Government consider providing the Director with a power to intervene in proceedings.

The Minister's powers over the Director are greater than those currently available to the Minister with respect to the ABCC.

S 11 of the BCII Act currently empowers the Minister to give written directions about how the ABCC must exercise powers or functions under the Act. The Minister's power cannot be exercised over a particular case and is subject to Parliament's scrutiny [disallowance]. The proposed replacement powers retain this capacity supplemented by a Ministerial capacity to give directions about the "…policies, programs and priorities of the Director." [proposed s 11(1) of the Bill]

Part 2 of the proposed Chapter 2 establishes a new body, the Fair Work Building Inspectorate Advisory Board. It is intended to provide recommendations to the Director about policies guiding the performance of his or her functions and exercise of his or her powers, the Director's priorities

and programs the Director implements. The Advisory Board comprises the Director and Fair Work Ombudsman ex officio, and up to 5 other members appointed by the Minister.

The Bill proposes the Minister appoints the Chair from the non-ex officio members who are themselves appointed for a term of up to 3 years. There does not seem any restriction on further terms. Voting arrangements are unclear but it is proposed that a quorum comprise the Chair and the ex officio members.

Cumulatively, these measures are not transparent. There is clear capacity for the Minister to channel, both directly and indirectly, what the Director does and how the Director operates and, more importantly, how and where the FW Inspectorate places its efforts. As drafted, the Bill provides that the Minister can over-ride, or enforce, Advisory Board recommendations. The Advisory Board members, including the Chair, are subject to maximum three year terms.

This capacity does not provide confidence in the Director's capacity to discharge his or her role independently in the context to the proposed Act, its powers and object.

Recommendation
The Government reassess its approach to oversight and direction of the Director and inspectorate. The Minister's powers should be not be expanded beyond the existing powers under the BCII Act. The main scrutiny of the Director's powers should be by way of Parliament's consideration of the annual report.

The Bill proposes to repeal Chapters 5 and 6 of the BCII Act which deal with unlawful industrial action and discrimination, coercion and unfair contracts. These matters would now be dealt with under the *Fair Work Act 2009*, that is, they would be dealt with in the same way as for other industries. It remains to be seen whether there is yet good reason to withdraw the special attention paid these issues under the BCII Act.

The Bill proposes to significantly amend Chapter 7, Enforcement, of the BCII Act. A replacement Part 1 limits the Director's use of special powers to obtain information and also provides for the capacity to exclude a project from the use of the powers.

As well, the special powers can only be exercised after the Director has applied to and received an examination notice from a designated member of the Administrative Appeals Tribunal. It is proposed that an examination notice must be applied for when the Director has been unable to obtain relevant information, evidence or documentation relevant to one or more investigations using his or her ordinary powers. There must be an investigation on foot.

The Director must apply with an affidavit addressing a number of factors including details of the investigation, the Director's attempts to obtain the required information, evidence or document(s), why the Director believes the person can give the evidence or has the information or document(s), previous notices applied for with respect to the person or the investigation(s).

The designated member must be satisfied amongst other things that there is an investigation or investigations.

The conditionality of examination notices doesn't end there. The designated member must be satisfied that these matters are in fact the case, as well as being satisfied issuing a notice would be appropriate in all the circumstances and being satisfied as to other matters which are prescribed. The explanatory memorandum [at para 128] provides that a prescribed matter could include the seriousness of the alleged breach and whether the person's compliance with the examination notice would have undue impact on the person. ABI understands that the Government is considering regulating in these terms.

Two points should be made. No-one would wish to have an examination notice issued against them. They are intrusive. Being left alone is obviously preferable. Nonetheless, there are two reasons why examination notices might be necessary. A person may not wish to give information, or wish to withhold it, or a person may not wish to be seen to co-operate with giving information.

Recommendation

The Government consider

- enacting (rather than regulating) requirements to be taken into consideration in considering an examination notice.
- not proceeding with requiring consideration of "undue impact". "Undue impact" is highly subjective and also it is difficult to see how sensible information about this can be ascertained by either the Director or designated member.

Second, the way that the Bill links the requirement that the information, evidence or document sought is subject to a formal investigation which is in train raises serious questions about any information, evidence or documentation which begins to emerge under an examination notice related to possible unlawfulness or illegality which is not the subject of the examination notice and may not be the subject of an investigation because the Director was hitherto unaware of it, such as

- whether the examination notice is breached, and
- the status of information, evidence or documentation which begins to emerge.

Unexpected information, evidence or the unexpected scope of document(s) could also relate to a building project for which a determination under proposed s 39 (dealt with below) is in effect.

Recommendation:

The Government consider clarifying that discovery of unexpected, or unknown, information or documents under an examination notice not constitute a breach of the notice. If it is required to obtain further information, evidence or documents associated with the hitherto unknown possible breach, the fact they came to light under an existing examination notice not constitute a barrier to obtaining an examination notice for the new investigation.

The Bill also proposes the establishment of the Independent Assessor - Special Building Industry Powers. It is proposed the Assessor should be able to determine that the Director may not apply to the nominated Presidential member for an examination notice concerning an investigation of the "building project" which is subject to the Assessor's determination. In other words, the capacity to apply for an examination notice, which is significantly circumscribed in the Bill, can also be "switched off" to prevent the application of an examination notice for a particular project.

The Assessor must be satisfied that "switching off" the investigation powers

- is appropriate having regard to the object of the Bill (provision of a balanced framework for co-operative, productive harmonious workplace relations (relevantly) by ensuring compliance, providing effective enforcement and effective safeguards on enforcement and investigation powers) and matters prescribed by regulation;
- is not contrary to the public interest.

It is difficult to discern any proper policy reason to provide for the Assessor and the capacity to "switch off" investigation powers.

As noted above the use of special powers is heavily circumscribed. Not only is use subject to the issue of an examination notice but the Director's power to apply for an examination notice cannot be delegated, and all examination notices, and variations, together with supporting documentation for the application must be reported to the Commonwealth Ombudsman. Records of interview, including transcript and video must be forwarded to the Commonwealth Ombudsman. Applications must be supported by affidavit.

Arguably, these protections are excessive and could prove counter-productive to the achievement of the Act's stated object. However, whether the Government accepts this view, and amends its Bill, or not, and proceeds with the Bill's proposed protections the legislated level of protection will be something which, in the Parliament's view, is appropriate for those who become subject to an examination notice.

This means that "switching off" investigation powers should not be determined on the basis of having regard to the Bill's object to provide effective safeguards. This would be contradictory having regard to the Bill and also having regard to the legislated protections. Determining whether to "switch off" special powers would presumably need to be done having regard to the object of providing a balanced framework for co-operative, productive harmonious workplace relations (relevantly) by ensuring compliance and providing effective enforcement.

This suggests that there may be times that Assessor determines that the object of a balanced framework for co-operative, productive harmonious workplace relations outweighs the object of ensuring compliance and providing effective enforcement or that these are sufficiently balanced that either prescribed factors or the public interest are such to satisfy the Assessor.

Recommendation

The Government reconsider providing for the Independent Assessor - Special Building Industry Powers or the capacity to "switch off" the special investigation powers. This is ABI's preferred outcome.

In the event that some "switching off "capacity is retained in the Bill there appear to be a number of technical difficulties with the current proposal.

As discussed above, there are matters about which the Assessor must be satisfied in order to issue a determination to "switch-off" the special powers for a project. Some of these are to be prescribed by regulation. The explanatory memorandum suggests the regulated criteria might include demonstrated compliance with workplace relations law, including court and tribunal orders in connection with the building project. It is understood that the government is considering a regulation of this type and perhaps requiring the Assessor to consider other interested persons' views.

It is not clear why behaviour on other projects or past behaviour is not also a relevant factor. Confining the requirement that the Assessor must have regard to behaviour in connection with the project appears inconsistent with the current provision in the Bill that an application may be made before the project starts. It also sits uneasily with the capacity to apply for more than one project in the one application, as does not requiring the Assessor to have regard to behaviour elsewhere or previously.

Recommendation

If "switching-off" is retained, the Government consider broadening the consideration of behaviour to include the consideration of past behaviour and behaviour on other projects.

An "interested person" in this instance should be confined to persons with a direct contractual interest, or in the case of unions, with members engaged on the project, or if there is a greenfields or other project agreement, unions covered by the agreement.

The process might be facilitated if the gazettal of the application identifies who is an "interested person" for the purposes of commenting on the application and providing a date by which submissions must be made (or a hearing date).

The second is that these "switching-off" provisions apply to a "building project" where the "building work" commences after the commencement of the proposed subdivision in the Bill. "Building work" is confined to on-site activities. The Bill proposes excluding off-site prefabrication of made-to-order components to form part of a building when it is undertaken off-site.

This is an uncertain marker and seems conducive to legal disputes. Apart from the uncertainty about which day building work commenced on a particular project, it is also conducive to bizarre outcomes such as weather effectively bringing a particular project within the "switching-off" provisions because of the delay in starting building work.

"Building project" is undefined. Maintenance and supply and fit contracts may have a life over two or three years, may specify the nature of the maintenance service or supply/fit generally or specify on a job-by-job basis. Undertaking each particular maintenance or supply/fit job may flow from the contract or be triggered by a specific request made under the contract. These types of contract may apply over a large geographic area. There seem clear difficulties in identifying what is the building project.

As noted above revised Guidelines were issued on 9 July will come into effect for projects which were the subject of an expression of interest or tender let for the first time on or after 1 August 2009. Previous revisions or reissues of the implementation guidelines have also taken effect on the basis of the date of the expression of interest or letting the tender. These timings are understood in the industry and have not created uncertainty.

Recommendation

If "switching-off" is retained, the Government might consider allowing the capacity to "switch-off" to apply to projects which were the subject of an expression of interest or tender let for the first time on or after 1 February 2010. The building project would be defined by the scope of the contract and the date is certain. Respondents to the call for an expression of interest or tenderers would act knowing which rules apply.

The Government might also consider clarifying that a determination could be issued with a finite life or be geographically confined. If this were adopted, neither limitation would of itself prevent extension or renewal in appropriate circumstances.

Applications may be brought by the Minister or an "interested person". An application can cover one or more projects.

The Minister may require the Assessor to provide specified reports relating to the Assessor's functions and powers. This power does not appear to prevent a request for a report about a particular case. Who is an "interested person" is to be prescribed by regulation. It is understood that the Government is considering prescribing that all "building industry participants" in relation to the project would be "interested persons". Were "interested person" to be defined as widely as this it is difficult to understand the policy reason for also providing a power to apply to the Minister.

ABI has concerns about prescribing "interested person" widely. It seems reasonable to expect that the interests of different potential "interested persons" as to a project's duration and the level of harmony in its industrial relations may not be uniform. If, for example, unions are prescribed to be "interested persons" because of their eligibility rule, it seems likely that those which were not party to negotiations for and/or are not covered by a greenfields agreement may have very different interests concerning the efficiency and harmony of a project and the quality of outcome than other "interested persons".

A broad definition of "interested person" also raises the possibility that collective bargaining might take place over the question of whether there should be an application for "switching-off". Unless

it were determined that making or supporting (or using best endeavours to effect) an application were not a matter pertaining to the relationship between the employer(s) and union(s) the negotiation could be supported by protected industrial action. Conceptually (but unlikely) such a term may become part of a workplace determination.

The Director, who is to be advised of applications and given the opportunity to make submissions, also has the capacity to request a reconsideration of a determination to "switch-off".

Recommendation
If "switching-off" is retained, the Government might reconsider doing away with the capacity for an "interested person" to apply to have powers "switched-off" and confining applications to the Minister. Confining the right to apply to the Minister would also obviate the need for the Minister to be able to require a report relating to the Assessor's functions and powers in a particular matter. If the Government is not minded to restrict application rights to the Minister it might consider restricting applications to the head contractor(s) of the building project(s).

The Bill proposes that, subject only to the restriction that an applicant for a "switching-off" determination from the Assessor who is unsuccessful cannot make another application for that project on the same grounds (unless new information becomes available), any "interested person" may apply at any time. Applications may be made after the completion of the project. It is difficult to envisage a sensible legitimate reason why an "interested person" would wish to have the special powers "switched-off" after the project is completed.

More generally, there is a potential for serial applications brought by different "interested persons" and nuisance application brought by "interested persons" with peripheral or no proper interest in the project.

The Assessor must make a decision having regard to the factors outlined above. This presumably means that, excepting a repeat application for a specific project which is made on the same grounds and without new information (not a high hurdle), the Assessor is required to fully assess each application for a project and implicitly to seek the views of the other parties.

The result of all of this is that contractors cannot know whether a project they are considering will be subject to normal rules or be "switched-off" at some stage. There is no cut-off point for applications. Such uncertainty invites tenderers to price the project risk on the basis that because the project could be "switched-off" it will be, that is, to tender on the basis that the project will not be subject to the full level of enforcement capacity.

Recommendation

If "switching-off" is retained, and "interested person" is not significantly restricted, the Government might reconsider allowing applications to be made at any time. Possible limitations include

- allowing only one "switching-off" application on a particular building project;
- restricting "switching-off" applications to building projects which are subject to the Implementation Guidelines
- confining "switching-off" applications to building projects above a certain value.

Proposed s 46 of the Bill provides that an application for an examination notice cannot be made after 5 years from commencement.

Recommendation

The Government consider making the proposed automatic sunset rescission of the power to apply for examination notices subject to a public review to ascertain whether there is a need to retain the capacity.

Proposed s 51(6) prohibits the Director from requiring a person subject to an examination order to not discuss information, answers given or matters relating to the examination. This prohibition not only potentially compromises an investigation by allowing someone of interest to know what has been said already, but importantly it removes protection from the first person.

Recommendation

The Government re-consider this provision.

Proposed s 52(2) permits a person subject to an examination notice to refuse to disclose information if disclosure would breach legal professional privilege or is subject to public interest immunity. The BCII Act does not provide these reasons for refusal but protects the person from self-incrimination (except with respect to lying in the interview) or external liability.

Examinations are proposed to be subject to transcript and tape reports to the Commonwealth Ombudsman, who is also required to review and make a report about such examinations.

Recommendation

The Government reconsider this provision.

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