

Senate Education and Employment Legislation Committee

Building and Construction Industry (Improving Productivity) Bill 2013

and the

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

SUBMISSION BY THE

QUEENSLAND COUNCIL OF UNIONS

27 September, 2016

Introduction

The Federal Government is again introducing its previously failed legislative bills - the Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 - into federal Parliament.

These Bills are virtually in identical terms to Bills rejected by the Senate in 2015 after an inquiry and report by the Senate Education and Employment Legislation Committee.

The Queensland Council of Unions consists of 27 affiliated unions and works with Queensland unions who represent over 360,000 members in Queensland on industrial, political and social justice issues.

The QCU opposed these Bills when they were introduced almost two years ago and it maintains its opposition to the Bills.

When considered, it can be seen that these Bills do not improve the industry or balance the interests or occupational safety of those who work within it.

Rather, they are politically-driven laws designed to maintain an ideological attack on the labour movement and the values of equity and fairness that unions represent.

This submission will demonstrate that these laws will actually:

- Remove the workplace rights of a distinct group of Australians
- Increase dangers in the workplace
- Damage productivity in the construction industry
- Fail to address claims of corruption in Australia's construction industry
- Undermine fairness in Australia's industrial relations system

The Government has failed to demonstrate why proposed laws which were rejected less than three years ago should now be approved.

Removing the workplace rights of a distinct group of Australians

The current Fair Work Building Commission *already has* coercive powers unparalleled for an industrial regulator anywhere else in the world.

After it was renamed FWBC, it retained the previous power held by the ABCC to compel people to attend and answer questions without the ability to refuse on the grounds of self-incrimination (Commonwealth, S 52, Fair Work [Building Industry] Act 2012).

This power abrogates the fundamental common law privilege against self-exposure to penalties and forfeiture (Sorby v Commonwealth (1983) 152 CLR 281 and 292 (Gibbs CJ) and 309 (Mason, Wilson and Dawson JJ); Australian Crime Commission v Stoddart (2011) 244 CLR 554 at [186] (Crennan, Kiefel and Bell JJ).

The FWBC Director (FWBC Report 2014-15, p15) maintains that coercive interviews are '*a critical tool in breaking down the walls of silence in the industry.*' This oft repeated claim is simply a very poor political justification for the existence of these extraordinary powers.

Allen, Dungan and Peetz (p62) say that only the Australian Security Intelligence Organisation has similar coercive powers regarding the questions of persons who assist in relation to a terrorism offence. In contrast, the ABCC can apply these ASIO-style powers to investigate an employee's breach of an award, with questioning in secret.

The Law Council of Australia (p3) has endorsed those human rights concerns, and strongly recommended against the bill. In a submission to government in February this year the Council states:

A number of features of the Bill are contrary to rule of law principles and traditional common law rights and privileges such as those relating to the burden of proof, the privilege against self incrimination, the right to silence, freedom from retrospective laws and the delegation of law making power to the executive.

It is also unclear as to whether aspects of the Bill which infringe upon rights and freedoms are a necessary and proportionate response to allegations of corruption and illegal activity within the building and construction industry.

Aside from these coercive powers, the FWBC currently has the full range of powers available to the Fair Work Ombudsman. The construction unions routinely comply with notices from FWBC requiring production of documents. There have been no prosecutions against unions or union members for failing to comply with them.

The civil penalties supporting the power to require production of documents and records is an adequate deterrent against non-compliance and has been effective since the *Fair Work Act* was introduced in 2009. FWO inspectors (including those from FWBC appointed as Fair Work inspectors) currently have power to:

- inspect any work, process or object,
- interview any person,
- require a person to tell the inspector who has custody of, or access to, a record or document,
- require a person who has custody of, or access to, a record or document, to produce the record or document to the inspector
- inspect, and make copies of, any record or document that is kept on the premises or is accessible from a computer that is kept on the premises;
- take samples of any goods or substances in accordance with any procedures prescribed by the regulations.

FWBC inspectors would continue to have and use these powers whether the Bill passes or not.

Increasing dangers in the workplace

Under the Howard-era ABCC, workplace fatalities in the construction sector rose from just over three per 100,000 workers to nearly five per 100,000 workers before falling again to around four.

After the “neutering” of the ABCC, the fatality rate fell to just over two.

Removing the ABCC and its replacement with the FWBC coincided with a significant fall in the number of workers being killed on building sites (SafeWork Australia, 2015, p14).

The number of claims for serious injuries in the construction industry has also declined since the ABCC was abolished, according to SafeWork figures (2015, p28).

Under questioning in the Senate over the passage of this legislation in 2015, the Australian Chamber of Commerce and Industry (ACCI), Australian Industry Group (AiGroup) and the Master Builders—admitted their organisations had no research or other data on construction health and safety.

It was made clear to the inquiry that it was just not on their agenda. All of this reinforces that the reintroduction of the ABCC bill is a political move by the government (Dissenting Report, 2016, Senate Inquiry).

Submissions have been made that this legislation could have a negative impact on preventing workplace injury and death.

Under this legislation, the ABCC could seek to have any workplace meeting deemed illegal (including one related to OHS) and fine workers who attend \$36 000 each and the union \$180 000 if it called the meeting, or did anything outside the narrow definition of 'protected action'. Evidence provided to the Committee argues that this would impact on worker's motivation to report and have investigated workplace health and safety matters (Australian Council of Trade Unions, Submission 2, p. 5.)

Damaging productivity in the construction industry

There is no evidence whatsoever to show that the ABCC has delivered any tangible benefits to the industry or the Australian economy more generally.

It has cost Australia taxpayers over \$250 million since it was set up in 2005. It has since its inception engaged in a union-busting campaign at an ongoing cost to the public of around \$30 million a year.

The FWBC has significant public resources at its disposal. Total FWBC income increased from \$29.780m in 2013-14 to \$34.792m in 2014-15. It has a total of 146 staff.

Yet the federal government claims that there is a compelling economic case for the passage of the Bill.

The so-called economic case for the ABCC was totally demolished by the submissions made on the Bills during the 2013-14 Senate Committee inquiries.

Heavy reliance for the ‘improved productivity’ argument is placed on an analysis originally undertaken in 2007 by Econtech (now Independent Economics) which were commissioned, variously, by the ABCC and the Master Builders Association.

These self-serving reports have been widely criticised by a range of people, including Hon. Murray Wilcox QC (2009) who described the report as ‘deeply flawed’ and said it ‘ought to be totally disregarded’, as well as various academics and economic writers.

A report by PriceWaterHouseCoopers (PwC) in October 2013 on Productivity in the Construction Industry described the reports as ‘found wanting on a number of methodological grounds’, with no discernible

contribution having been made by the ABCC to productivity in the construction industry. Rather, data used in the PwC report demonstrates that construction industry labour productivity has grown steadily since at least 1994-95 and appears to be broadly consistent with comparable industries.

The Econtech Reports are the source of figure that the ABCC and the 'industry reform package' of the Howard Government was responsible for a 9.4 percent productivity improvement across the industry. The method used in the Reports to produce this figure was to simply compare the costs of completing standard tasks (e.g. laying concrete) in the less unionised housing sector against the more unionised commercial construction sector, as though union density were the only feature which distinguishes the two sectors.

Allan et al (p63) further identifies errors in findings of the Econtech Reports, notably around the use of cost data and ongoing failures to address these errors in subsequent revised Reports.

In fact, Allan et al (p63) suggest the wider body of literature around the unionized building and construction industry would benefit from more co-operative union-management relations, instead of the ABCC's intention to penalize cooperative relations.

Failing to address claims of corruption in Australia's construction industry

As a civil body, the ABCC does not investigate breaches under criminal law, it only deals with possible contraventions in industrial law, which are civil matters.

Claims from the Prime Minister in a media statement on 31 August 2016 that the ABCC will deal with "addressing lawlessness in the construction industry" are false.

The QCU, representing 27 affiliated unions in the state, has always maintained that the police are the appropriate authority to deal with any claims of lawlessness and corruption (Battams, 2016).

Any serious federal government attempt to deal with allegations of lawlessness within any industry or section of Australian society would start with a federal independent commission investigating corruption, a call that has been made many times but ignored repeatedly by the Coalition.

A federal body examining corruption would likely find examples throughout society, including big banks and investment schemes, as well as political parties.

Individuals in corporate Australia, government, Parliament and in registered organisations such as employer groups and trade unions, who participate in corrupt behavior should be appropriately exposed and penalised.

The ABCC legislation will do nothing to address these issues which affect the wider community, and diminish community confidence in our public institutions.

Undermining fairness in Australia's industrial relations system

A wide range of professional organisations and community representatives, including cross-bench Senators in previous and current Parliaments, have echoed and acted on concerns about the restoration of the ABCC.

The Law Council (p3) has previously highlighted the dangers to natural justice inherent in the legislation.

Respected professions such as education practitioners have campaigned against the ABCC and for the retention of workplace rights for construction workers.

The Australian Education Union (SA Branch) highlights the injustice in a letter to senators on 15 July 2015:

"Australian workers, ourselves included, live under some of the most restrictive and unjust definitions of 'protected industrial action' in the developed world. To increase the penalties applicable under this system is unacceptable to us."

The building industry laws have, on no less than eight separate occasions, been found by the ILO's Committee of Experts on the Application of Conventions and Recommendations and the Committee on Freedom of Association to be contrary to core International Labour Conventions to which Australia is signatory.

It is not as though the Federal Government is proposing to introduce laws that have never been tested against international standards. These laws have already failed to measure up to these standards.

It is extraordinary that the Government is promoting these laws yet again, despite the strident and sustained national and international condemnation they have already received.

Conclusion

This submission adds to the weight of evidence discrediting any legal and economic justification for these laws.

These laws single out and attacks workers from one specific industry – construction - on particularly flimsy grounds as outlined.

Claims from the federal Coalition that these laws will increase productivity have been refuted, with government reports using inaccurate data in a desperate attempt to justify its position.

The real drain on productivity emanates from the federal Coalition's obsession with attacking unions and workers.

Unsurprisingly, these laws fail when measured against international labour conventions, justifying the strident community opposition to the legislation.

Evidence shows these laws also attack the workplace safety standards of construction workers, making a tough job even more dangerous.

Union leaders, particularly those who represent workers in hazardous industries, must act quickly and decisively when the safety and well-being of their members is at risk.

This imperative runs through the blood of union representatives.

As QCU General Secretary Ros McLennan told ABC Radio in June 2016, when discussing Workers' Memorial Day:

"The important thing is that each worker has the right to return home safe at the end of the day because their family needs them and our community needs them."

Fighting hard to ensure that workers come home safely to their families after a day's work is a central tenet of unionism.

The proposed ABCC legislation will only make productive workplaces more dangerous and this Committee should recommend that Senators should comprehensively reject these Bills.

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