



Law Council
OF AUSTRALIA

Re-establishment of the Australian Building and Construction Commission

Senate Education and Employment Legislation Committee

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2016 Executive as at 1 January 2016 are:

- Mr S. Stuart Clark AM, President
- Ms Fiona McLeod SC, President-Elect
- Mr Morry Bailes, Treasurer
- Mr Arthur Moses SC, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Michael Fitzgerald, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council acknowledges the assistance of the Federal Litigation and Dispute Resolution Section's Industrial Law Committee and its National Criminal Law Committee in the preparation of this submission.

Executive Summary

1. The Law Council is grateful for the opportunity to provide this brief submission in response to the Senate Education and Employment References Committee's (the Committee) inquiry into the re-establishment of the Australian Building and Construction Commission (ABCC) through the Building and Construction Industry (Improving Productivity) Bill 2013 [No. 2] (**the Bill**) and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 (**the Transitional Bill**).
2. The purpose of the Bill and Transitional Bill is to re-institute a separate workplace relations framework for the building industry based largely on the *Building and Construction Industry Improvement Act 2005* (Cth) (**the BCII Act**). The Bill would re-establish the ABCC and invest the Australian Building and Construction Commissioner (**ABC Commissioner**) with coercive questioning powers, introduce a new civil penalty offence of unlawful picketing, reintroduce provisions dealing with unlawful industrial action, coercion and the associated civil penalties specific to the building industry, and broaden the scope of these provisions. It would provide for penalties for building industry participants which are considerably higher than those available under the existing *Fair Work Act 2009* (Cth) (**Fair Work Act**).
3. The Law Council accepts that the Bill is aimed at the legitimate objective of addressing specific issues relating to allegations of corruption and behaviour within the building and construction industry.
4. On 19 February 2016, the Law Council made a submission regarding the public consultation by the Senate Education and Employment References Committee's (**References Committee**) inquiry into the Bill.
5. The Law Council's submission noted that if the Bill is tested against strict rule of law principles, it is inconsistent with those principles in many respects, including 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. The Law Council's February 2016 submission also noted that it is 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. For these reasons, the Law Council's primary recommendation was that the Bill not be passed in its current form.
6. If it is to be enacted, the Law Council's February 2016 submission made a number of recommendations as to how the Bill may be strengthened to align with rule of law principles and traditional common law rights and privileges.
7. The Law Council notes that the current Bill is identical in terms to the Bill before Parliament in 2013 and early 2016.
8. However, the Law Council understands that it is the Government's intention that the Bill be passed and that many of the measures in the Bill aim to maintain the current position under industrial relations legislation or for consistency with such legislation.
9. It also recognises that the References Committee did not accept the alternative recommendations made by the Law Council in its February 2016 submission. Further, the Law Council acknowledges that addressing many of its concerns may require a longer term exercise to review a broad range of legislation, given that they aim for consistency with industrial legislation such as the Fair Work Act.

10. Consequently, the Law Council's submission now puts forward alternatives for amending the Bill which should be adopted as a minimum, in the event Parliament provides support for its enactment.

Proposed legislation

Inappropriate delegations of legislative power

11. The Law Council, in its submission dated 19 February 2016, raised concerns in relation to a range of delegations of legislative power contained in the Bill. The recommendations of the Law Council in relation to this set of provisions were twofold:
- The Committee await the Senate Standing Committee for the Scrutiny of Bill's (**SSCSB's**) findings on the Bill to address the appropriateness of these matters being dealt with in delegated legislation rather than primary legislation. Where the SSCSB suggests an inappropriate delegation of legislative power, the ABCC legislation should be amended accordingly;
 - The scope of the application of the coercive powers should be specified within the primary legislation.
12. Given that the References Committee did not accept the Law Council's recommendations from its February 2016 submission, the Law Council makes the below recommendations, which should as a minimum be observed. The Law Council notes that in cases where it has made an alternative suggestion of an amendment to the Explanatory Memorandum to the Bill, this does not resolve broader rule of law concerns. This would require a wider consideration of how rule of law concerns may be addressed within the industrial relations framework.
13. Clause 120 of the Bill allows the Minister to make rules by legislative instrument. The following provisions of the Bill involve a delegation of legislative power with which the Law Council has concerns:
- The definition of 'authorised applicant' in Clause 5 of the Bill includes a person defined as such by the rules. The Law Council understands that this provision is intended to ensure consistency with the Fair Work Act and allow the regime to adapt to changing circumstances. The Law Council's view is that such a justification is not sufficient. It is not clear why a person other than the ABC Commissioner or a person affected by a contravention should, in theory, be permitted to bring proceedings. It is difficult to imagine a scenario where neither the ABC Commissioner nor a person affected by a contravention would institute proceedings.

Recommendation:

- **The Explanatory Memorandum should be amended to provide some clarity in relation to the situations where a person other than the person affected by a contravention should be permitted to bring proceedings.**
- Clause 6 of the Bill allows rules to be made to include additional activities within the definition of 'building work.' This provision is intended, the Law Council understands, to again provide adaptability should industry conditions change; it is also noted that Clause 6 will not change the current position under the *Fair Work (Building Industry) Act 2012* (Cth) (**Fair Work Building Industry Act**). The Law Council notes that the definition of 'building work' is quite broad in any event and the Explanatory Memorandum states that 'it is intended that rules will be made where it is not clear whether or not a

particular activity falls within the definition of building work'.¹ In those circumstances, the Law Council sees this rule making power as one intended to be used sparingly.

Recommendation:

- **If this provision is indeed intended to have limited scope, the Explanatory Memorandum should be amended to make this clear.**
- Subclause 11(2) allows the rules to extend the application of the Bill in relation to the exclusive economic zone and waters above the continental shelf. The Law Council previously noted in its submission of 19 February 2016 that the Explanatory Memorandum does not address why this is necessary or proportionate. It is understood that the provision is intended to allow for easier adaptation in the event of changing industry circumstances.

Recommendation:

- **The Explanatory Memorandum should be amended with a view to setting out the purpose and justification for this provision.**
- Paragraph 19(1)(d) gives the ABC Commissioner the power to delegate to 'a person...prescribed by the rules.' The Law Council notes that the Federal Safety Commissioner has the same power of delegation under the Fair Work Building Industry Act and the Law Council understands that this power is intended to ensure that the ABC Commissioner can most effectively manage his or her workload and, in doing so, can draw on specialist expertise that would otherwise not be available.

Recommendation:

- **The Explanatory Memorandum should be amended to make clear the limited purposes for which it is intended this power can be exercised.**
- Clause 43 provides that a Work Health and Safety Accreditation Scheme may be established under the rules. The Law Council understands that the specifics of this scheme are contained in the *Fair Work (Building Industry—Accreditation Scheme) Regulations 2005*; however, this is not made clear either in the Bill itself or in the Explanatory Memorandum.

¹ Explanatory Memorandum, Building and Construction Industry (Improving Productivity) Bill 2016 [No. 2] (Cth), 7.

Recommendation:

- **Either the Explanatory Memorandum or the Bill itself should be amended to make clear that the above Regulations apply.**

- Paragraph 70(1)(c) provides that the purposes for which an inspector may exercise compliance powers include ‘purposes of a provision of the rules that confer functions or powers on inspectors.’ The Law Council previously noted that this provision, in effect, could allow coercive powers to be exercised in a wider range of circumstances not contemplated by Parliament. It is understood that this provision is thought to be necessary to allow for appropriate responses to changing circumstances or unforeseen regulatory challenges. It is also noted that this provision maintains consistency with both the Fair Work Act and the Fair Work Building Industry Act.

For a number of reasons, Law Council remains concerned with the inclusion of this provision. First, it is not clear what purposes other than ascertaining compliance with a relevant law or court order can, or indeed should, underpin the exercise of inspectors’ powers. Any further expansion of the purposes for which inspectors may exercise their powers may inappropriately broaden inspectors’ remit. Second, any potential expansion of the circumstances in which inspectors may exercise their powers is troubling in light of the minimal (if any) judicial or tribunal oversight to which the exercise of those powers is subject. Third, as the Law Council has previously noted, delegated legislation is not the appropriate instrument in which such powers should be specified; the appropriate course is to spell out the scope of inspector’s powers in the primary legislation.

Recommendations:

- **The scope of application of the coercive powers should be specified within the primary legislation.**
- **If the proposed rule-making power is to be included in the Bill:**
 - **At a minimum, the Explanatory Memorandum should be amended to provide clear guidance as to when and why the purposes for which inspectors can exercise their powers should be broadened beyond what they already are; and**
 - **The relevant coercive powers should be subject to greater independent oversight.**

Insufficiently defined and overly broad discretionary powers

14. The Law Council has previously noted that subclause 21(3), which provides the Minister the power to appoint an ABC Commissioner, is broad and non-specific in relation to the nature of suitable qualifications or experience of the ABC Commissioner. It is understood that this provision is intended to mirror similar provisions in the BCII Act, the Fair Work Building Industry Act and the Fair Work Act. The selection process will also be subject to the Australian Government Merit and Transparency Policy.

15. The Law Council's position remains unchanged.

Recommendation:

- **Subclause 21(3) or the Explanatory Memorandum should indicate in more detail the nature of suitable qualifications or experience for the ABC Commissioner.**

Coercive powers

16. In its previous submission, the Law Council raised concerns about the proposed coercive powers contained in the Bill. In particular, the Law Council was of the view that there should be independent oversight by the Administrative Appeals Tribunal (AAT) or a court in relation to the issuing of examination notices.

17. The Law Council notes that the Bill provides for oversight of these powers by the Commonwealth Ombudsman and that similar powers of some other Commonwealth regulators are not subject to prior approval. However, as noted in the Law Council's previous submission, the Commonwealth Ombudsman's oversight is not a sufficient safeguard in these circumstances since the Ombudsman can only engage in a *post hoc* assessment of compliance with the relevant provisions. Further, the fact that other regulators operate under similar regimes is not a measure of whether such a regime provides appropriate oversight and safeguards for the exercise of these extraordinary coercive powers.

18. Other arguments in favour of the proposed regime include not imposing additional 'red tape' and the proposition that compulsory examination powers are powers of last resort and often invoked at the witness's request. However, irrespective of whether witnesses request a compulsory examination notice, there will be instances where no such request is made. In either case – and certainly in the latter – independent oversight prior to the exercise of coercive powers is necessary.

Recommendation:

- **Independent oversight by the AAT or a court should be required before the exercise of coercive powers under the Bill.**

Entry onto premises without consent or warrant

19. The Law Council previously expressed the view in its submissions that the power of ABC inspectors and federal safety officers to enter premises should require consent or a judicial warrant; in the alternative, senior executive authorisation should be required and there should be reporting requirements and guidelines for the exercise of powers.

20. The Law Council understands that the ABC Commissioner will be able to issue directions, either general or specific, and adopt administrative guidelines to inform ABC inspectors in relation to the exercise of these powers. This is welcomed by the Law Council. However, the Law Council maintains its position in relation to the need for either judicial warrant or senior executive authorisation.

21. While similar powers are contained in other legislation, it is again noted that the frequency with which powers of a particular nature appear in the statute books is of

limited relevance when it is the nature of the powers themselves – and thus the appropriate preconditions to the exercise of those powers – that are at issue.

Recommendation:

- **The power of inspectors and federal safety officers to enter premises should require consent or a judicial warrant. In the alternative, if this is not accepted by the Committee, the powers to enter premises should at a minimum require senior executive authorisation for the exercise of the powers as well as reporting requirements.**

Self-incrimination

22. The Law Council has expressed concern in relation to the use/derivative use immunity not being extended to civil proceedings for documents and records produced to inspectors exercising their general powers. In the Law Council's view, these immunities ought to be so extended.
23. The penalties that can flow from civil proceedings are significant. Further, the Law Council notes that successful criminal prosecutions, in which use/derivative use immunities apply, are routinely undertaken around Australia under the Work Health and Safety Act, for example. It is unclear why the ability of the regulator to successfully bring proceedings for breaches of the Bill would be compromised if the immunities were extended to civil proceedings, particularly noting the expansive evidence gathering powers given to inspectors.

Recommendations:

- **The use/derivative use immunity applicable in clause 102(3) should be expanded to civil proceedings.**
- **In the alternative, as a minimum, if the immunity is not expanded to civil proceedings, then a fuller explanation should be provided in the Explanatory Memorandum as to why that is considered necessary and proportionate.**
- **A fuller explanation be provided in the Explanatory Memorandum of the importance of the public interest and why the abrogation of the privilege is considered absolutely necessary.**

Reversal of the onus of proof

24. The Law Council in its submission of 19 February 2016 noted that some provisions of the Bill reverse the onus of proof. The Law Council remains concerned with the absence of justification for these provisions, although it notes that the onus of proof is an evidentiary rather than a legal burden.

25. The Attorney-General's Department *Guide to Framing Commonwealth Offences* notes that '[t]he fact that it is difficult for the prosecution to prove a particular matter has not traditionally been considered in itself to be a sound justification for placing the burden of proof on a defendant'.² Further, while placing the onus of proof on a defendant may be justified in circumstances where the relevant issue is peculiarly within the knowledge of the defendant, as noted in the Law Council's previous submission, this does not appear to be the case in relation to certain provisions (for example, subparagraph 7(2)(c)(ii)).
26. In relation to the proposed offence of 'unlawful picketing' in clause 47, the Law Council previously raised concerns in relation to the reversal of the burden of proof contained in clause 57. In particular, the Law Council was concerned that the explanatory materials did not indicate why a person would be able to produce evidence of lawful intention. In this respect, the Law Council notes the decision of *State of Victoria v Construction, Forestry, Mining and Energy Union* [2013] FCAFC 160, which made clear that the inquiry in relation to the relevant person's intention involves a search for the relevant person's 'real or actual intents'.³ The Law Council further notes the Minister's response to the SSCSB's inquiries as to the justification for, and fairness of, this provision:

*In practice...a person will be free to produce relevant evidence that demonstrates their actual intent when undertaking the action in question. In the case of unlawful picketing, for example, it would be open to a person who had engaged in picketing action to present evidence of their motivation for engaging in that behaviour. Clearly the evidence will vary depending on the nature of the matter but could take the form of documentary evidence such as email correspondence, or testimony from other parties engaged in the picketing activity directed at demonstrating that the activity resulted from an alternative motivation.*⁴

Recommendation:

- **The Explanatory Memorandum should be amended to provide an adequate justification for these provisions and more information as to how clause 57 might operate in practice.**

Reasonable excuse

27. In its previous submissions, the Law Council raised concerns in relation to the appropriateness of a 'reasonable excuse' defence for some of the civil penalty provisions. This was based on the Attorney-General's Department's *Guide to Framing*

² Commonwealth Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011) 50.

³ *State of Victoria v Construction, Forestry, Mining and Energy Union* [2013] FCAFC 160 at [84] per Buchanan and Griffiths JJ.

⁴ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest No 2 of 2016*, 24 February 2016, 46.

Commonwealth Offences which provides that the defence of 'reasonable excuse' should generally be avoided because it is too open-ended.⁵

28. The *Guide* also provides that the 'reasonable excuse' offence may be applied if it is not possible to rely on the general defences in the Criminal Code or to design more specific defences.⁶
29. The Law Council understands from its discussions with Government that the Government is of the view that it is not possible to list specific defences given the broad range of circumstances that could justify a person's failure to comply with these requests.
30. While the Law Council notes that the defence is open-ended in nature and can be difficult for both the defence to establish and the prosecution to respond to, it is of the view that there are circumstances where it is appropriate that non-compliance with a request be excused but which do not fall into any defences contained in the Commonwealth Criminal Code.

Recommendation:

- **The Explanatory Memorandum should be amended to provide some non-exhaustive guidance as to circumstances in which the 'reasonable excuse' may arise.**

Retrospectivity

31. The Law Council previously made the recommendation that the coercive powers in the Bill should only operate prospectively or, in the alternative, the powers should operate retrospectively only if the conduct was an offence at the time it is alleged to have been committed. The Law Council further recommended that the retrospective rule making power in relation to the definition of 'building work' and the extension of the Act to Christmas Island and Cocos (Keeling) Islands should only apply prospectively in the absence of sufficient justification.
32. In relation to the coercive powers, the Law Council understands that these provisions are intended to ensure ongoing investigations that the current Fair Work Building Industry Inspectorate is conducting can be taken over by the new ABCC and to allow the ABCC to investigate breaches under previous Acts that occurred before the Bill commences. It is noted that there is nothing allowing the coercive powers to be exercised in relation to conduct that would amount to a contravention of the Bill but which occurred before the Bill's commencement.
33. In relation to the other retrospective rule making provisions, the Law Council notes the 120 day 'time limit' that applies to these provisions. It appears that this power is intended to have limited application in cases of unforeseen circumstances that arise soon after the Bill's commencement.

⁵ Commonwealth Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011) 52.

⁶ *Ibid.*

Recommendation:

- **The measures in the Bill should apply prospectively. If this is not accepted by the Committee, the Explanatory Memorandum should be amended, as a minimum, to make clear the purpose and limited application of these retrospective rule making powers.**

Penalties

34. The Law Council has noted that the penalties in the Bill are higher than those in the Fair Work Act. The Law Council notes that the Government is of the view that the current penalties are seen to be an insufficient deterrent, and that it states that its position is in accordance with the Cole Royal Commission and Heydon Royal Commission. The Cole Royal Commission noted that the then existing prohibitions on the claiming, payment and acceptance of strike pay were being widely disregarded in the industry.⁷ The Heydon Royal Commission also reconfirmed the need for higher penalties having considered that the present penalties are an inefficient deterrent to unlawful conduct in the building and construction industry.⁸

35. The Law Council understands that there should be effective deterrence in relation to unlawful conduct. If the Government is to increase the penalties, it should make clear in the Explanatory Memorandum why the penalties are being increased.

Recommendation:

- **The Explanatory Memorandum should be amended so that the need for increased penalties is made clear.**

Exclusion of judicial review

36. The Law Council's position on this aspect since its February 2016 submission remains unchanged. The Law Council understands that decisions under the Bill are exempt from *Administrative Decisions (Judicial Review) Act 1977 (ADJR Act)* review on the basis that:

- such an exemption maintains the status quo under the Fair Work Act and Fair Work Building Industry Act; and
- a similar exemption was applied to the former BCII Act, the Fair Work Building Industry Act and the Fair Work Act in relation to decisions of the Fair Work Commission and the Fair Work Ombudsman.

⁷ Royal Commission into the Building and Construction Industry, *Final Report* (2003), 131 (Recommendation 144).

⁸ *Final Report of the Royal Commission into Trade Union Governance and Corruption: Volume 1*, December 2015, 139, 140; *Volume 5*, 1 December 2015, [185]-[188].

37. However, for the reasons outlined in its 19 February 2016 submission, the Law Council maintains its position that decisions made under the Bill should not be excluded from the application of the ADJR Act.
38. The Law Council is of the view that there is insufficient justification for the exclusion of the application of the ADJR Act. Noting that the former ABCC Commissioner recommended the removal of the exemption,⁹ as did the former Administrative Review Council (**ARC**),¹⁰ it is suggested that the ability of the regulator to carry out its functions will not be significantly undermined by the application of the ADJR Act. In any event, as the ARC noted, '[t]hese are regulatory-type powers which would ordinarily be subject to ADJR Act review.'¹¹ Moreover, the Law Council notes that section 39B of the *Judiciary Act 1903* (Cth) remains available as a jurisdictional basis for judicial review. In that context, the Law Council notes the following comments of the SSCSB:

The ADJR Act is beneficial legislation that overcomes a number of technical and remedial complications that arise in an application for judicial review under alternative jurisdictional bases (principally, section 39B of the Judiciary Act)... The proliferation of exclusions from the ADJR Act is to be avoided.¹²

Recommendation:

- **The proposed exemption of ABCC decisions in paragraph (2) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be removed.**

Merits review—provision of reasons

39. The Law Council previously recommended that the Minister should be required to provide the ABC Commissioner with a statement of reasons upon termination of an appointment.
40. The Law Council notes that clause 28 of the Bill mirrors provisions in other comparable legislation. Nonetheless, the Law Council refers the Committee to its previous submission on this issue.

⁹ Administrative Review Council, *Federal Judicial Review in Australia*, Report No. 50 (2012), 204.

¹⁰ *Ibid.*, 205.

¹¹ *Ibid.*

¹² Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest No. 9 of 2013*, 11 December 2013, 2.

Recommendations:

- **The Bill should be amended to require the Minister to provide the ABC Commissioner with a statement of reasons upon termination of an appointment.**
- **If the provision of reasons as a matter of course is not agreeable to the Committee, then the Bill should be amended to, as a minimum, require the Minister to provide a statement of reasons upon request.**

Incompatibility with human rights

41. The Law Council's position on this aspect since its February 2016 submission remains unchanged. As noted in the Law Council's previous submission, the Parliamentary Joint Committee on Human Rights (**PJCHR**) has previously formed the view that the prohibition on picketing is incompatible with human rights and that clauses 61(7) and 105 (disclosure of information) are incompatible with human rights.
42. The Law Council again commends the PJCHR's report to the Committee. It is noted that the proposed reasons in the Bill's Statement of Compatibility with Human Rights as to why the above measures are necessary and proportionate are, in substance, the same as those which the PJCHR considered – and found inadequate – in its report.¹³ It is further noted that, while the Heydon Royal Commission recommended regulation of industrially motivated picketing,¹⁴ this does not address the substantive point in relation to compliance with human rights obligations.

Recommendations:

- **The Committee should have regard to the previous findings of the Parliamentary Joint Committee on Human Rights.**

¹³ See, e.g. Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 Bills introduced 20 September – 2 October 2014 Fourteenth Report of the 44th Parliament*, 28 October 2014, 107 – 108, 111 – 112 and cf. Explanatory Memorandum, Building and Construction Industry (Improving Productivity) Bill 2016 [No 2], 58-59, 64.

¹⁴ *Final Report of the Royal Commission into Trade Union Governance and Corruption: Volume 1*, December 2015, 139 (Recommendation 66(b)).