ACTU
australian council of trade unions

Senate Education, Employment and Workplace Relations Committee

Inquiry regarding the *Building and Construction Industry Improvement (Transition to Fair Work) Bill* 2011

Australian Unions

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ABOUT THE ACTU

1. The ACTU welcomes the opportunity to comment on the *Building and Construction Industry Improvement (Transition to Fair Work) Bill* 2011 (`the Bill').

2. Our organisation is the peak national body representing trade unions. We make this submission on behalf of our affiliated unions including the State and Territory labour councils. Our submission complements, and we unreservedly support, the joint submission of the four unions with significant membership in the construction industry.

3. The ACTU remains fundamentally opposed to the continuance of separate labour inspectorate for the construction industry, particularly one with coercive powers. Ultimately this is an issue of equality before the law, which in most civilised societies is accepted as a reasonably compelling argument.

KEY FEATURES OF THE BILL

4. The key features of the Bill, and the elements which this submission addresses, are as follows:

Subject matter	Element	Our position	Page reference
Institutional matters	Abolition of ABCC	Support	3
	Establishment of Office of the Fair Work Building Industry Inspectorate	Oppose	3
	Establishment of an Advisory Board	Qualified Support	5
Substantive law	Abolition of industry specific laws and penalties	Support	6
Powers	Retention of coercive powers	Oppose	7
	Safeguards on use of coercive powers	Qualified support	9
	Independent Assessor and determinations	Qualified support	12
Miscellaneous	Scope of activity	Support	15
	Retention of intervention right	Oppose	15

INSTITUTIONAL MATTERS

Abolition of the ABCC

5. The ACTU welcomes unreservedly the abolition of the Australian Building and Construction Commission. The ABCC, and its predecessor, failed in the primary obligation of a regulator to enforce the law impartially.

6. However we do not support the creation of a new, statutorily separate inspectorate, with separate funding, staff and leadership. There is a real risk that this is simply reconstituting the ABCC under a new name.

Establishment of Office of the Fair Work Building Industry Inspectorate

7. The approach taken in the Bill is inconsistent with the government's previous commitment to abolish the ABCC and to create specialist divisions within the workplace inspectorate that can focus on particular industries or sectors. The Government's earlier commitment included the proposition that 'The first divisions established will be for the building industry and hospitality industry.'[1] The ACTU is unable to find any reference in either Forward with Fairness or the Policy Implementation Plan that suggests that the specialist divisions would be constituted by statute.

8. The ACTU does not deny that there is a role for some industry specialisation within the Office of the Fair Work Ombudsman. However it is preferable that this be done administratively rather than by statute, to ensure that resources can be deployed to

[1] Forward with Fairness: Labor's plan for fairer and more productive workplaces, p 17.

areas of greatest need across the entire economy, and in response to emerging needs. This is because:

- Creating a separate inspectorate invites and entrenches arguments about the reach of its jurisdiction which are not triggered if the unit is established administratively.
- The operational autonomy of Fair Work Ombudsman and the Fair Work Building Industry Inspectorate could lead to divergence of the policies, programs and practices with no way to resolve inconsistencies. We are not confident that the proposed Advisory Board would be able to achieve a synchronisation of activities and approaches.
- The culture that develops within any law enforcement agency is critical to its success. We strongly believe that an inspectorate that is an administrative unit within the Fair Work Ombudsman is more likely to develop a successful culture. Rotation of staff within the Office of the Fair Work Ombudsman would expose inspectors and other staff to new perspectives. In contrast, we fear a separate inspectorate will struggle to develop an impartial enforcement culture, and that the deep distrust of the ABCC felt by many workers is likely to carry over to the new Fair Work Building Industry Inspectorate.

9. Our preferred model involves regular workplace inspectors enforcing the law using their ordinary powers. The Ombudsman could assign staff and resources to the unit. If the Ombudsman were not minded to create such a unit, the Minister could direct the Ombudsman to do so, pursuant to a power to issue general directions. This model retains the benefit of maximum flexibility for the Government (and the Office of the Fair Work Ombudsman) and could also be used to implement the promised specialist division for the hospitality industry.

Establishment of an Advisory Board

10. Without diminishing our opposition to the creation of a separate labour inspectorate, we see merit in any labour inspectorate having a tripartite advisory board and we believe such an arrangement could be equally be applied to the Office of the Fair Work Ombudsman. This would be consistent with Australia's international obligations[2] and would formalise consultative arrangements between the inspectorate and its key social partners regarding its programs and priorities.

11. However, we have concerns that the particular model of Advisory Board adopted in the Bill does not provide the appropriate balance of stakeholder representation, may not function effectively and has an insufficient influence on the Inspectorate. We recommend increasing the number of employer and employee representatives and adjusting the quorum requirements to provide for equal employer/employee representation. The latter amendment should also ensure that neither the Director nor the Fair Work Ombudsman has an effective veto on the functioning of the board by electing not to attend its meetings. We further recommend that the advisory board have a determinative role in respect of the policies, programs and priorities of the inspectorate and note that this was recommended by the independent report which precipitated the Bill[3].

[2] Article 5, *Convention concerning labour inspection in industry and commerce* (C81), ILO Geneva 1947 (ratified by Australia 24/6/1975).
[3] Hon M. Wilcox QC, *Transition to Fair Work Australia for the Building and Construction Industry,*(2009) ISBN 978-0-642-32765-9.

SUBSTANTIVE LAW

Abolition of industry specific laws and penalties

12. The ACTU strongly supports the repeal of Chapters 5 and 6 of the Principal Act. The government was elected with a mandate that one set of industrial laws should apply to all workers, including those in the building and construction industry. The *Fair Work Act* narrowly confines employees' ability to take protected industrial action, and provides a myriad of opportunities for employers to obtain relief against action taken outside these narrow confines.

13. The repeal of Chapters 5 and 6 will move closer to giving effect to the fundamental legal principle of the equality of all persons before the law. It will ensure that conduct that is not unlawful when engaged in by every other worker (such as taking unprotected industrial action outside the life of a workplace agreement) is similarly not unlawful in the construction industry. Further, a consequence of the repeal will be to apply the more proportionate penalty regime contained in the *Fair Work Act* to instances of unlawful unprotected industrial action in the building and construction industry. The level of the penalties in the Principal Act are grossly disproportionate to the public harm (if any) occasioned by the taking of unprotected industrial action, being at around the level associated with people smuggling[4], unauthorised mining operations in the Antarctic[5], carrying out electrical work without the requisite qualification/license[6] and sex offenders loitering around schools[7].

[4] *Criminal Code* Division 73
[5] *Antarctic Treaty (Environment Protection) Act* 1980, s.19B
[6] *Home Building Act* 1989 (NSW), s. 14
[7] *Crimes Act* 1958 (VIC) s. 60B(2A)(b)

POWERS

Retention of coercive powers

14. The Principal Act empowers the ABCC to compulsorily interrogate any person who may have information or documents that are of interest to it. A person must submit to the interview, on pain of six months' imprisonment. They may have a lawyer present, but not necessarily a lawyer of their own choosing. The ABCC's questioning powers are indeed similar to those available in connection with the questioning of suspected terrorists, except that compulsory interrogation of suspected terrorist requires a warrant to be issued by a Federal Judge or Magistrate[8], whereas the ABCC signs its own[9].

15. These are extreme powers that violate people's fundamental legal right to silence, as well as the right to legal representation. They overturn the presumption that it is the State which must prove a person's breach of the law, and that citizens are not compelled to assist the State to develop a case against themselves or against another person, unless they are ordered to by a Court.

16. We do not think that any analogies can be drawn to other areas of law, where coercive interviews are permitted in connection with a public interest in the strictest enforcement of the law. This occurs in those areas where non-compliance with the law would jeopardise:
    - national security;
    - public revenue and the capacity of government to function;
    - effective and democratic governance by those in public office (including the police);
    - the functioning of the economic system (as in cases of corporate fraud or anti-consumer conduct);

[8] *Australian Security Intelligence Organisation Act* 1979, Part 3 Division 3.
[9] *Building and Construction Industry Improvement Act* 2005 s. 52(1).

- the safety of people at work.

17. The enforcement of industrial law (whether in the building and construction industries, or generally) simply does not go to these issues of vital public importance. It does not raise questions of public safety, national security, the functioning of government, or the smooth operation of the economic system. Industrial law is merely concerned with the relationship between employers, employees and unions, just as rental tenancy law is concerned with the relationship between landlords and tenants. Inasmuch as it would be outrageous for an 'Australian Residential Tenancies Commissioner' to have powers to coercively interrogate people (including innocent bystanders) to investigate breaches of leases, it is wholly inappropriate for the ABCC to have coercive powers to enforce industrial law.

18. Moreover, it is important not to become resigned to accepting the invective rhetoric which has been called in aid to support the retention of coercive powers, merely because of its repetition in the media (or less courageously under the protection of parliamentary privilege). As is highlighted in the Joint Union submission, the instances of conduct that the Cole Royal Commission alleged to have occurred to necessitate these powers did not result in any significant enforcement activities. Equally, the coercive powers of the ABCC are not directed to combatting criminal behaviour - allegations of violence or criminal damage are investigated by police. Further, it is important to note that some protests connected with industrial disputes are generally recognised by the criminal law as being of a type that not should be subject to pre-emptive dispersion by police[10]: the mere public visibility of unions and workers exercising their democratic rights does not justify the use of strong arm of the law.

19. It is also worth noting that whilst the ABCC is conducting more investigations than ever before, it is only having resort to its coercive powers in 1.5% of cases[11]. Indeed

[10] E.g. *Crime Prevention Powers Act* 1998 (ACT), s.4; *Summary Offences Act* 1966 (VIC), s. 6; *Law Enforcement (Powers and Responsibilities) Act* 2009 (NSW) s, 197, 198A, 200.

[11] Comparison is based on data contained in "Report on the Exercise of Compliance Powers by the ABCC for the period 1 October 2005 to 30 September 2011" (available at www.abcc.gov.au) and ABCC Annual Reports regarding of numbers of investigations over the same period (also available at www.abcc.gov.au).

the ABCC recently reported that in the last financial year it undertook 30% more investigations, initiated 47% more investigations and finalised 32% more investigations with a lesser reliance on coercive powers and the vast majority of the remaining reliance on coercive powers occurred where witnesses *requested* that a compulsory notice be issued to them[12]. This surely indicates that such powers are far from essential for the proper performance of the inspectorate's functions, and are more a matter of convenience. These matters combined with the fact that days lost to industrial disputes in the construction industry are not appreciably different to when the ABCC was using its coercive powers in close to a quarter of its investigations[13] would tend to suggest that these coercive powers represent the abrogation of important rights and freedoms with no corresponding social benefit.

Safeguards on use of coercive powers

20. Having made these observations, if coercive powers are to be retained (which we clearly oppose), the introduction of safeguards to their exercise would be an improvement to the status quo. In that qualified context, we urge all Senators to support:
    - the requirement that a presidential member of the AAT must authorise the issuing of examination notices, only after being satisfied that the information is relevant, other methods to obtain the information have been unsuccessful, and that the circumstances warrant the use of coercive powers;
    - the rights of any person subjected to a coercive interview to legal representation by a lawyer of their choice, the right to refuse to provide information that is subject to lawyer-client privilege or public interest

[12] "Report on the Exercise of Compliance Powers by the ABCC for the period 1 October 2005 to 30 September 2011" (available at www.abcc.gov.au),
[13] Comparison is between ABS Series 6321.0.55.001 "Industrial Disputes, Australia" (Table 2a) and data contained in "Report on the Exercise of Compliance Powers by the ABCC for the period 1 October 2005 to 30 September 2011" (available at www.abcc.gov.au) and ABCC Annual Reports regarding of numbers of investigations over the same period (also available at www.abcc.gov.au).

immunity, and the reimbursement of expenses including legal expenses by the Commonwealth; and

- supervision of the coercive examination by the Commonwealth Ombudsman.

And we therefore limit our submission on this issue to the details of the implementation of these safeguards.

The process for issuing examination notices

21. Proposed Subsection 47(1)(f) would require the AAT member to be satisfied, having regard to all of the circumstances, that it is appropriate to issue a notice. However there is no mechanism that ensures that the AAT member is cognisant of all the circumstances.

22. In particular there is no mechanism to ensure that the AAT member is made aware that the subject of the notice is claiming a public interest immunity or that the information is subject to legal professional privilege.

23. We recognise that Mr Wilcox QC recommended that applications be heard ex parte. However, we urge that the Bill be amended to confer a right to be heard upon the person who is the subject of the application for an examination notice.

24. As currently drafted the Director is not under any obligation to advise the AAT member that the subject of the notice is, for example, the spouse of a person suspected of breaching a law or is a minor. Nor is the Director required to disclose to the AAT member the reasons that a person may have for refusing to participate in an interview under the general powers of investigation. For example a person might claim the information is protected by privilege or was otherwise provided in confidence. In such cases the AAT member would be able to weigh the competing public interests.

25. It is in fact likely that such circumstances will frequently arise. Because the information gleaned under the coercive powers cannot be used against the person who is the subject of the examination, the coercive powers are used against people who are

not suspected of any wrongdoing. This could include people who are in positions of trust, and have both statutory and professional obligations to protect confidential or personal information. Certain communications between union officials including union members or between employers and their accountants and other professionals constitute confidential or personal information. The AAT member needs information about the competing public interests in determining whether to issue the notice.

26. While the Director could be required to disclose all relevant circumstances, a simpler and more reliable way to ensure that the AAT member is apprised of all of the circumstances of the matter is to hear from the person who is the subject of the application.

The criteria used to determine whether to issue a coercive notice

27. The AAT member must not issue a notice unless he or she is satisfied of the factors listed in proposed section 47. An investigation or investigations must be on foot where the powers have not been "switched off". There must be reasonable grounds to believe the person the subject of the notice has relevant information, and that other methods of obtaining the information have been unsuccessfully attempted or would be inappropriate. The information sought must be likely to be of assistance in the investigation and it must be appropriate having regard to all the circumstances to issue a notice.

28. We note that the Bill weakens the tests proposed by Mr Wilcox QC in two principal ways:

- Proposed Subsection 47(1)(e) requires that the information is "likely to be of assistance," whereas Mr Wilcox QC recommended that a notice only be issues where the information "is likely to be important to the progress of the investigation." The subsection should be amended to reflect the higher threshold.
- Proposed Subsection 47(1)(g) allows for the government to regulate additional criteria. The government has previously indicated it will include two additional matters that were recommended by Mr Wilcox QC: the nature and likely seriousness of the suspected contravention; and the likely impact, insofar as it is known, on the person who is the

subject of the examination notice. This would impose a requirement upon the Director to disclose information about the subject of the notice such as whether the subject is a minor. The ACTU supports the inclusion of each of these in the threshold. We believe this should be done through amendment to the Bill rather than by regulation.

29. The Explanatory Memorandum indicates that that coercive powers would not be used except where the AAT member is satisfied that "**all** other methods of obtaining the material or evidence **have been tried** or were not appropriate"[14] [emphasis added]. However this is not guaranteed in the Bill. Proposed section 45(5)(e) requires the Director to set out in the application details of methods that have been tried, but it does not require the Director to exhaust the investigation methods available under the *Fair Work Act*. Proposed section 47(1)(d) requires the AAT member to be satisfied that "any other methods" have been unsuccessful or are not appropriate. The Bill should be amended to require the Director to have exhausted the ordinary powers prior to making and application.

The form and content of examination notices

30. The examination notices are required to describe how and where documents are to be produced, but there is no requirement that they specify the type of documents to be produced. The Bill should be amended to require the AAT member to specify the nature of the documents that are the subject of the examination notice.

Independent Assessor and Determinations

31. The Bill provides that an "interested person" (to be defined in regulations) can apply to the Independent Assessor to "switch off" the application of the coercive powers in respect to particular projects. In our view, if the coercive powers are to remain (which we oppose), then they should only be available where there is a compelling public interest justification. This could be achieved by redrafting the Bill so that

[14] At para 126

projects commence without coercive powers being available, and allow interested persons to make application to the Independent Assessor to "switch on" the powers.

32. Proposed section 40(3) makes clear that applications to the Independent Assessor in respect of information gathering powers can be made in respect to more than one project. To ensure consistency, the heading of proposed section 39 should refer to projects and section 39(2) and (3) should be amended to refer to 'project or projects'.

33. We understand the government intends to make regulations conferring standing as upon persons who are building industry participants in relation to a project or projects, such that they fall within the description of "interested person" for the purposes of sections 36(2) and 40. The ACTU understands that this would extend to an association that was able to represent employers or employees in respect to the project concerned, regardless of whether they are covered by particular workplace instruments. This approach seems sensible. It replicates the approach taken in the *Fair Work Act* where a union's eligibility rules are the primary means to determine whether it has representational rights at a workplace. As we understand it this would mean that a union that was able to exercise right of entry, or be covered by an enterprise agreement or make a greenfields agreement in respect of the building project(s) in question would be an interested person.

34. The ACTU suggests that peak councils should also have standing to make applications. Peak councils could make a single application supported by a number of unions or employer associations, and may be in a better position to obtain information about who the participants are for a particular project.

35. We oppose employer suggestions that a person could be disqualified from making an application based on their record of compliance. We do not oppose a simple means to dispose of patently unmeritorious applications, but believe this is better dealt with as a matter of substance, not standing.

36. The Bill does not give sufficient guidance to Independent Assessor about the procedures to be applied in determining an application by an interested person. In our view, the following natural justice obligations should be provided for in the

legislation. This need not require detailed regulation, but the following features should be enacted:

- An obligation on the Independent Assessor to be satisfied that evidence put to him or her about the prior conduct of a building industry participant is reliable;
- A requirement that the Independent Assessor publish reasons for decision; and
- Where an application (under proposed section 43) to reconsider a decision of the Independent Assessor is made, the applicant must be advised and be given an opportunity to be heard.
- Proposed section 39(3) provides that the Independent Assessor must have regard to the Objects of the Act, the public interest, and any matter prescribed in regulations.

37. The ACTU understands that the government intends to regulate that the Independent Assessor be required to have considered the views of other participants in the project. While we recognise the intention of this, the regulation will need to be drafted to reflect the fact that building projects will include many participants, not all of whom will be known at a particular time, and many of whom have only peripheral involvement with a project.

38. The question also arises as to how the Independent Assessor is to obtain the view of the participants. One option is to invite submissions. However, we believe that the applicant and the Director should be capable of providing the Independent Assessor with the information required. Alternatively, the Independent Assessor could be empowered to solicit the views of an interested person if, in his or her view, they could provide additional information that has not been obtained from the applicant or the Director.

MISCELLANEOUS

Scope of Activity

39. The ACTU remains concerned that the scope of the Principal Act is difficult to pinpoint with certainty. This concern was shared by the Committee[15] and a number of employers in 2005 when the Principal Act was enacted, and it has proven in practice to be difficult to know where the boundaries of the current Act are set. At a practical level there will be ongoing confusion about the respective responsibilities of the OFWO and the FWBI. More fundamentally, people should know which laws apply to them.

40. The exclusion of off-site pre-fabrication from the definition of building works will go a long way to improving this situation, and will bring greater certainty to the investigation of suspected breaches of the laws. To avoid any doubt the amendment proposed at Item 48 should be strengthened by including a new section 5(1)(h) which reads "the offsite site pre-fabrication of made to order components to form part of any building, structure or works."

Retention of intervention right

41. The ACTU notes that, contrary to Mr Wilcox QC's recommendation,[16] it is proposed that the new Inspectorate will retain the right to intervene in any proceedings under the *Fair Work Act* or the *Independent Contractors Act*. Mr Wilcox opposed this because of the risk that a case could be hijacked, and preferred that right to intervene

[15] Employment, Workplace Relations and Education References Committee
Beyond Cole The future of the construction industry: confrontation or co-operation? pp 53-55.
[16] Recommendation 9.15. p99

be granted by Fair Work Australia or the Court. In our view, if a right to intervene is to be retained it should be subject to the usual discretionary processes applicable in Fair Work Australia and the Court.

42. We add that we consider it highly inappropriate for an inspectorate, which is established to enforce the law, to be involved in proceedings relating to private interest-based disputes about enterprise bargaining, including applications for secret ballots, bargaining orders and suspension of industrial action.