



QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

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Committee Secretary
Senate Education and Employment Committees

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Building and Construction Industry (Improving Productivity) Bill 2013

Please accept this short submission by the QCCL on the above Bill

The purpose of this submission is not to enter into a debate about the state of the union movement in this country. It is to address a number of points of principle raised by this Bill in relation to the appropriate powers to be given to an investigative agency in this country.

We acknowledge that these criticisms are derived from an article by Professor George Williams and Nicola McGarrity on the former legislation – *The Investigatory Powers of the Australian Building and Construction Commission* (2008) 21 Australian Journal of Labour Law 244.

Firstly, we observe that this legislation relates not to criminal offences but the investigation of contraventions of the industrial laws and conduct leading to the imposition of civil penalties.

Despite the minor nature of the issues being investigated by the Commission it is given extraordinary powers.

First, the investigatory power in section in clause 61 is far too broad and vests too much discretion in the Commissioner – discussed at page 256-7 by Williams and McGarrity. The changes in the current Bill from the original legislation make no substantive change. The criticism stands

Secondly, the abrogation of the privilege against self-incrimination in clause 102 cannot possibly be justified. We take a strong position in support of the retention of the privilege for the reasons which were enunciated by Mr Terry O'Gorman in a speech "*The Right to Silence*" delivered to the 30th Australian Legal Convention.¹

In that speech Mr O'Gorman also criticised the substitution of a derivative use immunity as a safeguard following the abolition of the privilege.

No use immunity is an effective substitute for the privilege. In the case of the derivative use immunity the accused person has the difficult task of identifying the evidence which has been derived from the compulsory questioning.

There are then technical questions as to who bears the onus of proof on the issues raised by the immunity.

¹ Available at www.qccl.org.au

We do not feel that the introduction of the Ombudsman is a satisfactory substitute or control in respect of these powers. It will be impossible for the Ombudsman to provide an effective remedy for any injustice. Additionally we are concerned that this legislation creates a very disturbing precedent.

Nor do we consider that the fact that the existing Fair Work Inspectorate retains these powers is also an argument in favour of this legislation. These powers should not be invested in anybody.

Finally, we do not see the proposal for a sunset clause as being an adequate answer because inevitably when the sunset clause comes to expire the argument will be that the legislation is still needed and must be extended. The terrorism laws demonstrate the weakness of sunset clauses as a protection for civil liberties. Once laws are on the books they are very hard to get rid of.

We trust this is of assistance to you in your deliberations.

Yours faithfully

Michael Cope
President
For and on behalf of the
Queensland Council for Civil Liberties
18 February 2016