

Minority Report

The Australian Greens

The *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009* is an attempt to find balance where there is none to be found. The BCII Act is an affront to our democracy, demonising building workers and treating them as criminals in an industrial relations context.

The Australian Greens have placed on record a number of our times our complete opposition to the BCII Act and in particular its provisions providing separate offences of unlawful industrial action and coercion with harsher penalties for building workers and the coercive powers of investigation afforded to the ABCC.

We remain committed to the principle that there should be one law for all workers and that building and construction workers should not be singled out for more punitive treatment.

Supporters of the BCII Act and the retention of the coercive powers in the Bill point to the need for cultural change in the building and construction industry and cite examples of unacceptable behaviour to back their claims.¹ The Australian Greens do not condone any criminal activities or bullying or coercive behaviour whether in the workplace or not. However, we do not believe the BCII Act or the activities of the ABCC are a necessary or sufficient means of addressing such behaviour when it occurs.

The cultural change that is need in the building and construction industry is much broader and requires more than merely a concerted attack on the legitimate role of building unions. The introduction to the Majority Report comments on the nature of the building and construction industry and the broader problems identified within the industry including the use of phoenix companies, non- payment of workers entitlements, and disregard for occupational health and safety. The Australian Greens endorse the comments made concerning the limitations of the ABCC and the need to address a broader range of issues within the industry.

One of the key limitations of the approach embodied by the BCII Act and the ABCC is the almost exclusive focus on the actions of workers and their unions with employers seemingly targeted only due to their relations with unions. There is little focus on the problems engendered by management. It is quite clear that the ABCC has no interest in fulfilling its function in respect of investigating breaches by employers

1 see ACCI, *Submission 11*, MBA, *Submission 13*.

of their obligations to employees. By its own admission to ABCC does not investigate claims of underpayments or breaches of awards or agreement conditions.²

The Committee was reminded of the importance of good management practices in the evidence given by Mr Quinn. His evidence was a reminder that there remains a role for good management in changing the culture of the industry and that a collaborative approach is preferable and often more effective.³ In our view, the ABCC has not operated to enhance working relationships in the building and construction industry but has been an ideological experiment in vilifying workers and their representatives.

The Amendment Bill

As the Majority Report indicates, the background and issues raised by the BCII Act have been well covered in previous reports of the Committee including the 2004 Senate Committee Inquiry into the future of the construction industry and the report last year into the Australian Greens' Private Senator's Bill to repeal the BCII Act.

The Majority Report also provides a comprehensive summary of the key elements of the Bill. The Australian Greens generally agree with the comments of the Majority Report and endorse recommendations 1-6 made by the Government Senators.

We diverge in our views in relation to the need for the continued existence of a separate compliance agency for the building and construction industry and the retention of the coercive powers.

Removal of industry specific offences relating to industrial action and coercion

The Australian Greens support the removal of Chapters 5 and 6 of the BCII Act. These Chapters provide specific and harsher prohibitions on industrial action and increased penalties for unlawful industrial action and coercive behaviour in the building industry.

The removal of these provisions means that building and constructions workers are covered by the same prohibitions as all other workers and importantly the same penalties as other workers. We remain unconvinced by arguments made by industry representatives the BCII Act prohibitions and penalties are necessary. No other workers in Australia are subject to such harsh individual civil penalties for exercising their fundamental to right withdraw their labour.

2 See evidence of Hon John Lloyd, *Proof Committee Hansard*, 31 August 2009.

3 Mr Greg Quinn, *Proof Committee Hansard*, 31 August 2009, p. 32.

Building and construction workers will still face unnecessary restrictions on collective bargaining and freedom of association through the application of the Fair Work Act. The Australian Greens believe strongly that freedom of association is a fundamental right and that an integral part of that right is the right to take industrial action.

With the Fair Work Act now containing the substantive rights and obligations for all workers, the logical step is for all breaches of those laws to be dealt with by the Fair Work Ombudsman without a separate compliance agency for one section of the workforce. We agree with the ACTU that if there is to be a particular focus on the building and construction industry it should be in the form of a specialist division within the Office of the Fair Work Ombudsman. In particular we agree with the comments of the ACTU regarding the importance of the culture of an enforcement agency to its success and their comment that:

an inspectorate that is an administrative unit within the Fair Work Ombudsman is more likely to develop a successful culture.....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.⁴

An impartial enforcement culture is crucial to the success of the new Inspectorate, particularly if it is to carry out its functions in regard to ensuring compliance by employers of their obligations.

Coercive powers

The Australian Greens remain utterly opposed to the existence of the coercive powers in relation to investigating breaches of industrial law. We appreciate the safeguards the Government is seeking to introduce through this Bill, including the need for a Presidential member of the AAT to approve the use of coercive powers, the oversight of the Ombudsman, the specific provisions allowing people a lawyer of their choice and the addition of legal professional privilege and public interest immunity.

We understand the intention behind the "switching off" mechanism and the role of the Independent Assessor and we are sympathetic to the union calls for the coercive powers to be "switched on" rather than apply to all until "switched off" at a particular project.

All these measures, however, do not solve our fundamental objection, that is, that these coercive powers have no place in the regulation of industrial relations matters. As Professor Williams and Ms McGarrity conclude in their article on the investigatory powers of the ABCC:

4 ACTU, *Submission 19*, p.7.

It is wrong as a matter of legal policy to confer a draconian, overbroad and inadequately checked investigatory power on a body whose principal function is to investigate civil breaches of federal industrial law in a single industry....Given such fundamental concerns, our view is that the ABCC should be abolished. We further believe that it is inappropriate to create any other body to deal only with the building and construction industry. Contraventions of industrial law by participants in that sector should be investigated by a single body with a brief to apply its powers in a non-discriminatory manner to all employers and employees across all industries.⁵

We further note that as confirmed by the Commissioner in evidence to the Committee⁶, the coercive powers are not directed at the wrongdoers but at people who are not suspected of doing anything unlawful. Furthermore, as Mr Noonan commented in evidence, these laws are not directed at the types of behaviour that are used to justify their application:

The argument that is made in favour of these laws constantly reverts back to often unsubstantiated and hysterical allegations about criminality, violence, corruption and so on.....and yet these laws have absolutely nothing to do with any of those matters and are incapable of being used to prosecute any of those matters, and my view is that those who are the proponents of these laws continue to refer to those matters because they are unable to articulate an argument as to why industrial laws should require the removal of the right to silence and the imprisonment of working people for six months for attending a union meeting. If people could justify that, they would not be continually returning to matters which are unconnected, unrelated and incapable of being prosecuted under this law.⁷

The potential for a penalty of imprisonment for a worker not complying with a request under the coercive powers remains objectionable. We agree with the ACTU that:

Our view is that, before imprisonment could become a penalty, you would have to be found to be in contempt of either a court or an institution. The problem with the regime, even with the safeguards that are proposed, is that the person is not heard until they are prosecuted for failure to appear, with a penalty of imprisonment hanging over their head. In industrial law, for all other workers in the country, there is no prospect of imprisonment unless you are in contempt of court. We think that the same regime should apply to construction workers and construction employers and that imprisonment should only be available, as it is to all other citizens, if they are in contempt. The problem with this regime is that you move to imprisonment

5 Professor George Williams and Ms Nicola McGarrity, *Submission 1*, pp. 276-277.

6 Hon John Lloyd, *Proof Committee Hansard*, 31 August 2009, p. 67.

7 Mr Dave Noonan, *Proof Committee Hansard*, 31 August 2009, p. 54.

without having an opportunity to be heard or having an opportunity to explain why you do not wish to comply with the orders.⁸

We believe if these powers are to remain, the penalty of imprisonment must be removed.

The Australian Greens also do not accept the argument that the BCII Act is justified on the ground of perceived economic benefit. We are persuaded by the submission of Professor Peetz that much of the argument for the ABCC contributing to productivity gains is unsubstantiated and are concerned by his conclusion that 'if there are to be any economic effects from the operation of the ABCC, they are more likely to be increasing profits than increasing productivity.'⁹ In any event, we do not believe that economic gains can justify the assault on fundamental human rights that the BCII Act perpetrates.

We also do not accept the Government's continued rhetoric about a tough 'cop on the beat' for the building industry as justifying the continued singling out of building and construction workers for special treatment. Universal industrial, civil and criminal laws should be complied with and enforced on building sites as in any other workplaces.

The Australian Greens agree with the conclusion of Professor Williams and Ms McGarrity that:

even with these safeguards the coercive powers provided for in the primary Act are not justified. The safeguards do not, for example, overcome the fact that the coercive powers can be used in an overly-broad set of circumstances, such as regard to non-suspects and children in the investigation of minor or petty breaches of industrial law and industrial instruments. The coercive powers are not justified in this industrial setting. The preferable course would be to remove the powers entirely and to have a strong and effective enforcement and investigation regime that applies across all industries.¹⁰

It was to this end that the Australia Greens introduced our Private Senators' Bill to repeal the BCII Act in its entirety. We do not resile from this position.

8 Ms Cath Bowtell, *Proof Committee Hansard*, 31 August 2009, p. 14.

9 Professor David Peetz, *Submission 20*, p.27.

10 Professor George Williams and Ms Nicola McGarrity, *Submission 1*, covering letter, pp. 1-2.

International Obligations

The BCII Act has been considered by the ILO on a number of occasions to breach fundamental rights. The Australian Greens note the evidence given by the ACTU that in their view the Act as amended by the Bill will continue to be in breach of ILO conventions, in particular the Labour Inspection and the Freedom of Association and Right to Organise conventions.¹¹ Australia is a signatory to both these conventions which signal that we as a nation accept the principles found in those documents. ILO conventions are important as representing the framework for fair and balanced industrial relations. If we are in breach of the conventions we are falling outside what is acceptable international practice. The Australian Greens believe the Government should endeavour to ensure we live up to international standards not ignore them.

Occupational Health and Safety

The affect of the ABCC and its operations on occupational health and safety on building sites has been on ongoing concern of the Australian Greens. We referred to the potential of the ABCC having a detrimental effect on OHS when opposing the BCII Act back in 2005 and are afraid our concerns have been realised.

We note that under the amendments building workers can stop work if they have reasonable concern for their safety pursuant to provisions in the Fair Work Act. However, the prospect of investigation using the coercive powers and the heavy penalties for a worker making the wrong judgement places a disincentive on workers to be active in identifying unsafe work practices. It is unacceptable in an industry as dangerous as the building and construction industry for legislation to act counter to achieving the highest standards of health and safety practice.

As Mr Noonan commented in evidence, the only person facing imprisonment under the BCII Act at present is a worker who went to a safety meeting.¹² It is through this type of intimidation that the activities of the ABCC or its replacement body can have a detrimental impact on OH&S. The building and construction industry stills has an unacceptable number of fatalities and serious injuries. We note the comments of Professor Peetz on the number of fatalities exceeding the growth in employment in construction and that there is considerable research showing that unions have an important role in ensuring observance with occupational safety requirements.¹³ The new Inspectorate must ensure its activities do not operate to the detriment of strong occupational health and safety practices including the legitimate role of union delegates and workers' representatives.

11 Ms Cath Bowtell, *Proof Committee Hansard*, 31 August 2009, p. 14.

12 Mr Dave Noonan, *Proof Committee Hansard*, 31 August 2009, p. 54.

13 Professor David Peetz, *Submission 20*, p.27.

Conclusion

We reiterate that the BCII Act is an affront to our democracy and that in our view the amendments do not ultimately change that position. This Parliament has a duty to ensure that the building industry is regulated just like any other industry - in a fair and just manner that balances the needs of productivity and the economy with the health, safety and democratic rights of workers.

Recommendation 1

The Government withdraw the Bill and reintroduce a Bill to repeal the BCII Act, abolish the ABCC while maintaining the role of the Federal Safety Commissioner.

Recommendation 2

If Recommendation 1 is not acted upon, remove the penalty of imprisonment from clause 52 and replace it with a maximum penalty of 30 penalty units.

Senator Rachel Siewert

