

Minority Report by the Australian Greens

The *Building and Construction Industry (Restoring Workplace Rights) Bill 2008* is a simple piece of legislation. It has one key clause: the repeal of the *Building and Construction Industry Improvement Act 2005* (the BCII Act).

The BCII Act is the previous government's industrial relations agenda writ large. It is legislation that breaches workers fundamental rights, restricts collective bargaining and freedom of association and provides excessive and extreme penalties for breaches of its provisions.

The Majority Report sets out the background to the BCII Act and includes reference to the Cole Inquiry and the 2004 Senate Committee Inquiry into the future of the construction industry. The Committee Majority also provides a comprehensive discussion of the key issues of concern with the Act and the office of the Australian Building and Construction Commissioner (ABCC) raised by the submissions.

We will not repeat the discussion but we do wish to make additional comments to highlight the key reasons why the Australian Greens believe there is no justification for this legislation to continue to be on the statute books and why we have described these laws as "some of the most pernicious ever to have passed through this place".¹

The Australian Greens have consistently said that it is unacceptable to have workplace relations laws that take away the right to silence, deny people their choice of lawyer, provide powers to compel evidence with the possibility of gaol for non-compliance, and impose severe restrictions on the rights of workers to organise and bargain collectively.

As the Majority report details, the ABCC has extraordinary coercive and investigatory powers including powers to compel information, documents or the giving of evidence. Of particular concern is the breadth of these powers and the low investigatory threshold, given the extreme consequences for not complying with a notice from the ABCC, that is, imprisonment. We note too the infringement of civil liberties with the restriction on the right to silence. The Australian Greens feel strongly that such powers are not appropriate for the regulation of any workplaces.

The Majority Report details the evidence provided in submissions that demonstrate the important difference between agencies such as the Australian Competition and Consumer Commission and the ABCC. Of note are differences such as the option of monetary penalties and decisions being reviewable. There is also no need for the ABCC to obtain a warrant before it exercises any of its extensive powers. We particularly note, as does the Majority Report, the conclusion by Professor George Williams and Nicola McGarrity in their submission that the BCII Act has provisions that:

¹ Senator Rachel Siewert, Second Reading Speech, *Senate Hansard*, 28 August 2008, p. 3983.

"elevate the ABCC, and its objective of elimination of unlawful conduct in the building and construction industry, above even the protection of national security."²

There is just no genuine justification for a body regulating workplaces to have powers that exceed those of our national security agencies. This is an Act that singles people out on the basis of their work, not just their actions.

We have also been very concerned about the operations of the ABCC over the last few years. The Majority Report outlines evidence which supports our concerns that the ABCC has not been impartial in exercising its responsibilities and in fact has been turning a "blind eye" to unlawful employer actions. We are also concerned that the ABCC has acted in an unnecessarily intimidating way towards workers who themselves may not have breached the Act in any way.³

The other key concerns we have is the restrictions the legislation places on collective bargaining and freedom of association and the potential for adverse occupational health and safety consequences. The Combined Construction Union and ACTU submissions both detail how the Act breaches the International Labour Organisation convention on freedom of association including the right to organise and collectively bargain.⁴ Australia is a signatory to the relevant ILO Conventions and all Governments should endeavour to ensure the legislation they propose to the Parliament satisfies our international obligations.

Freedom of association is a fundamental right. An integral part of that right is the right to take industrial action. A key means by which the BCII Act prohibits industrial action is the provision for financial penalties of up to \$110 000 for unions and \$22 000 for individuals who engage in "unprotected" strike action. The BCII Act all but abolishes the right to take industrial action for workers in the building and construction industry.

As the Combined Construction Unions indicate:

" the combined effect of [the *Workplace Relations Act* provisions] and the BCII Act, which effectively ensures that virtually all forms of unprotected industrial action are unlawful and subject to harsh penalties, adds a coercive dimension to the regulation of the workplace. Almost any departure from ordinary work patterns in the construction industry which

- (a) does not qualify as 'protected action' for any reason
- (b) has not been authorised in advance and in writing by the employer; or
- (c) does not meet the strict definition of health and safety disputes which are excluded from the definition of building industrial action

will attract a penalty."⁵

² Professor George Williams and Nicola McGarrity, *Submission 6*, p. 258.

³ See for example, Paul Ruiz, *Submission 1*.

⁴ CCU, *Submission 13*, pp. 15-21 and ACTU, *Submission 15*, pp. 15-16.

⁵ CCU, *Submission 13*, p. 14.

No other workers in Australia are subject to such harsh individual civil penalties for exercising their fundamental to right withdraw their labour.

The ACTU and Combined Construction Unions submissions also detail the potential for adverse occupational health and safety consequences that may flow from the provisions of the BCII Act.⁶ In particular, they demonstrate that while under the BCII Act workers can stop work if they have reasonable concern for their safety, it is the employees that have the burden of proof under these provisions. The prospect of 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.

The BCII Act does not just trample on the rights of workers, it is also unnecessary. We agree with the submissions and the majority report that conclude that there are already adequate mechanisms for dealing with workplace and industrial issues in the Workplace Relations Act and at common law.

As Professor Williams and Ms McGarrity conclude:

"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."⁷

The Australian Greens do not accept the argument put forward by many of those that support the BCII Act that the Act and the ABCC is justified on the ground of perceived economic benefit. 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.

We note the recommendations of the Majority Report for appropriate safeguards for the use of coercive powers by the ABCC be put in place as a matter of urgency and for the government to without delay address the issues identified by the International Labour Organisation. While we would support any such moves on behalf of the

⁶ CCU, *Submission 13*, pp. 10-11 and ACTU, *Submission 15*, pp. 12-15.

⁷ Williams and McGarrity, *Submission 6*, pp. 276-277.

Government, these are a poor substitute for the government not acting to repeal the BCII Act immediately.

While we agree with the most of the comments by the Government Senators in their Majority Report, we do not understand the conclusion that the Bill not be passed. There is a lack of logic in making comments that lead to the conclusion that the legislation is fundamentally flawed, breaches the rights of workers in a particular industry, and is grossly unfair but then not supporting the urgent repealing of that legislation. The reasons raised by the Majority Report for not supporting the Bill being passed are concerns about the safety bodies and the status of current investigations and the staff of the ABCC. These are matters that are easily remedied by transitional provisions. The Australian Greens would support amendments to the Bill to facilitate these matters.

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

"The ABCC's investigatory powers simply have no place in a modern, fair system of industrial relations, let alone one of a nation that prides itself on political and industrial freedoms."⁸

We reiterate that the BCII Act is an affront to our democracy, and that this Parliament must 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 Bill be passed.

Senator Rachel Siewert

⁸ Williams and McGarrity, *Submission 6*, p. 279.