Senate Education and Employment Legislation Committee

Construction Industry Amendment (Protecting Witnesses) Bill 2015

Submission by the Combined Construction Unions

10 April 2015

Introduction

1. The following submission is made on behalf of the:-

   - Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (AMWU),
   - Australian Workers Union (AWU),
   - Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU); and
   - the Construction Forestry, Mining and Energy Union (CFMEU),

   collectively, the Combined Construction Unions.

2. The Bill being considered by this Committee, the *Construction Industry Amendment (Protecting Witnesses) Bill* 2015 (the Bill) amends the *Fair Work (Building Industry) Act 2012* (*FW (BI) Act*) to extend the period during which the Director of the Fair Work Building Industry Inspectorate (FWBII) can apply to a nominated Administrative Appeals Tribunal presidential member for an examination notice by a period of two years. Under the current provisions of the FW (BI) Act, the capacity for the Director to make such an application will expire on 31 May 2015.

3. The FW (BI) Act now provides that the Director may apply for an examination notice in circumstances where he/she wants to obtain information relevant to an investigation into a suspected contravention of the FW (BI) Act or a designated building law by a building industry participant. Once issued, these examination notices can compel a person to give certain information or documents to the Director, or to attend in person before the Director to answer questions relevant to an investigation not less than 14 days after the examination notice is given. A failure to comply with these notices is a criminal offence attracting a penalty of up to six months imprisonment.[1] The common law privilege against self-incrimination which would otherwise apply is overridden by the FW (BI) Act.[2]

4. The power to issue coercive notices in construction-related industrial matters, supported by a criminal sanction for non-compliance, has existed since the introduction of the *Building and Construction industry Improvement Act* in 2005.

5. In 2012, following the Wilcox review, the FW (BI) Act came into effect. This Act retained the coercive powers/criminal sanction until May 2015. It also introduced a number of statutory safeguards designed to minimise the chances of this intrusive power being abused.

6. The Combined Construction Unions have consistently opposed the introduction and use of these powers in industrial matters since their inception. The power, and the criminal sanction which attaches to it, are excessive, unnecessary and inconsistent with internationally recognised labour standards and the industrial norms of a modern democracy.

7. For the reasons set out below, we oppose the continuation of these powers as provided for by this Bill and urge that the Committee recommend that the Bill be opposed.

[1] s. 52 FW (BI) Act
[2] s. 53 FW(BI) Act

Enforcement of Industrial Laws

8. Under current federal legislation there are two separate and separately funded, statutory agencies enforcing one set of industrial laws. The Fair Work Ombudsman (FWO) is established under the *Fair Work Act* 2009 (FW Act). The FWBII is created by the FW (BI) Act.

9. Although the FWBII is confined in its role to laws applying to 'building work' as defined, its statutory mandate is virtually identical to that of the FWO. Section 10 of the FW(BI) Act provides that the functions of the Director include promoting harmonious, productive and cooperative workplace relations in the building industry and compliance with designated building laws by all building industry participants. Section 682 of the FW Act confers the same functions on the FWO without singling out or distinguishing between any particular industries.

10. Despite having the same statutory functions, in practice the FWO and FWBII perform their functions in very different ways. More will be said about this below.

11. Since the introduction of the FW(BI) Act in 2012, there is **no difference** in the laws that the FWO and FWBII enforce or the penalties which apply to any contraventions of those laws. Critically, both agencies have responsibility for the enforcement of industrial laws applying in the workplace under the FW Act, including the laws applying to industrial action, freedom of association, entry to workplaces and so on. Overwhelmingly, contraventions of these laws attract civil penalties and are not criminal offences.

12. Neither the FWO nor the FWBII has any role in enforcing criminal laws covering such things as intimidation, blackmail or offences under the *Corporations Act* 2001, which are matters referred to in the Explanatory Memorandum for this Bill and which are apparently cited to justify the Bill's passage.

13. If this Bill is rejected, from 1 June 2015, FWBII inspectors will have the same powers in respect of building matters as those available to inspectors of the FWO under the FW Act[3]. There has never been any suggestion that these powers are ineffective or inadequate for an industrial inspectorate. To the contrary, the FWO has proved an effective regulator and has used all of its available powers to investigate and prosecute industrial matters in an uncontroversial and apolitical way.

Powers

14. The FWO currently has the power to compel the production of records or documents to assist it in investigating industrial contraventions.[4] FWBII inspectors are usually also appointed as inspectors under the FW Act and in that capacity make regular use of the power to compel production of documents under s. 712. The construction unions routinely comply with these notices from FWBII requiring production of documents. There have been no prosecutions against unions or union members for failing to comply with them. However, unlike the FW (BI) Act, a failure to comply with these provision results in a civil penalty. It is not a criminal offence.

[3] see s. 59C of the FW (BI) Act
[4] s. 712 FW Act

15. The civil penalty regime supporting the power to require production of documents and records is an adequate deterrent against non-compliance and has worked effectively since 2009.

16. FWO inspectors (including those within FWBII appointed as Fair Work inspectors) also currently have the power to:-

    - inspect any work, process or object,
    - interview any person,
    - require a person to tell the inspector who has custody of, or access to, a record or document,
    - require a person who has the custody of, or access to, a record or document to produce the record or document to the inspector either while the inspector is on the premises, or within a specified period
    - inspect, and make copies of, any record or document that is kept on the premises or is accessible from a computer that is kept on the premises;
    - take samples of any goods or substances in accordance with any procedures prescribed by the regulations.[5]

    FWO/FWBII inspectors would continue to have and use these powers if this Bill is rejected.

17. The main difference between these powers and the existing FWBII coercive powers (aside from the criminal penalty for non-compliance) is the capacity of the FWBII to compel the physical attendance of witnesses at a nominated place for questioning by the FWBII.

18. In his political intervention into the case for extension of the coercive powers, the FWBII Director has argued publicly that this power is necessary because some witnesses do not want to be seen to be cooperating with FWBII investigations for fear of union reprisals. There is no basis for this assertion. Construction industry employers have never shown any reluctance in resisting union claims or opposing union policies. Employers regularly negotiate from a position of opposition to the industry's unions and use the courts and industrial tribunals to advance their interests without any fear or hesitation about how the unions will react. There is no reason why the situation would be any different for employer engagement with FWBII.

19. Further, the FWBII's own records show that in any event there has been very limited recent use of these powers at all. The most recently published report of the FWBII shows that the FWBII's coercive notices have only been relied on **four times** in the 2013-14 period and **twice** in the period 2012-13.[6] The fact is the FWBII has not used these notices to 'cover' for large numbers of witnesses who would not come forward without them.

20. Even if the allegation about the need to clothe witnesses with notices were correct, it ignores the fact that in the absence of the coercive powers it would be very easy for someone who wanted to assist an FWBII investigation to do so confidentially. Even if the person was ultimately required to give evidence in court, they could be required to do so through the ordinary processes of the court (subpoena) and therefore be seen to be doing so under compulsion. As to

[5] s. 709
[6] FWBII Annual Report 2013-14

production of documents, a civil penalty clearly provides a sufficient level of compulsion, even for 'willing witnesses'.

21. The rationale for retaining the coercive powers does not withstand scrutiny let alone justify the continuation of these powers.

22. The powers and the criminal sanction behind them represent a serious incursion into the civil liberties of Australian citizens which is unwarranted in a workplace context. They are plainly not critical to the investigation and enforcement processes of the FWBII. The powers conferred by the FW Act are adequate and proportionate for the purposes of industrial investigations.

How the FWBII Performs its Functions

23. There is another important point of distinction between the FWO and the FWBII. The FWO carries out the full range of functions that would ordinarily be expected of a labour inspectorate and does so in a way that is consistent with Australia's international obligations as a signatory to ILO Convention 81 - *Labour Inspection*. This Convention describes the central role of any labour inspectorate as securing '*the enforcement of the legal provisions relating to conditions of work* ***and the protection of workers while engaged in their work****, such as provisions relating to hours, wages, safety, health and welfare, the employment of children and young persons, and other connected matters,'* [7] (emphasis added)

24. The FWBII on the other hand has made a policy decision not to perform that role, even though it is clearly a part of its statutory responsibilities to do so. The Director describes the enforcement of workers' rights and entitlements as not part of the FWBII's 'core business'.

25. Instead, in relation to the enforcement of employee entitlements, the FWBII has 'outsourced' this responsibility to the FWO. It has done that on the basis that the FWO is better equipped to carry out the work. This failure to carry out the proper role of a labour inspectorate has drawn strong condemnation from the ILO's Committee of Experts on the Application of Recommendations and Conventions. In 2011 that body said of the ABCC (now FWBII):-

> *'Noting with concern that the manner in which the ABCC carries out its activities seems to have led to the exclusion of workers in the building and construction industry from the protection that the labour inspection system ought to secure for these workers under the applicable laws, the Committee urges the Government to ensure that the priorities of the ABCC (or the Fair Work Building Industry Inspectorate) are effectively reoriented so that labour inspectors in the building and construction industry may focus on their main functions in full conformity with Article 3(1) and (2) of the Convention.'*

26. This 'policy' decision by the FWBII not to secure and enforce employee entitlements but to abdicate that responsibility to the FWO makes the case for continuing to repose coercive powers in this agency untenable. In effect it would amount to supporting more invasive and

[7] See Article 3, 1(a).

draconian powers, and criminal sanctions, for an agency prosecuting unions and workers but not for the agency which enforces industrial laws on behalf of employees.

27. The FWBII has also shown that it is incapable of responsibly exercising these intrusive powers. In *CDPP v. Tribe* the South Australian Magistrates Court found that a coercive notice issued by the ABCC to a construction worker Ark Tribe, was legally defective. The ABCC later confirmed to Senate Estimates that all 203 coercive notices which had compelled the attendance of Australian citizens up to that date had suffered from the same legal defect.[8] It also confirmed that in spite of these defects all the information and documents were retained by the ABCC[9], the recipients of the invalid notices were not told of the defect[10] and that no other remedial steps were taken in relation to material obtained by the use of the invalid notices.[11]

28. The FWBII's track record of investigating and prosecuting unions and workers, its publicly stated policy position on enforcement and its disregard of the functions given to it by Parliament in the current Act, demonstrate that extending the coercive powers for such a body would be tantamount to endorsing the use of those powers in a completely one-sided and ideological way.

The Wilcox Inquiry

29. The argument that the Wilcox Inquiry supports the extension of the life of the coercive powers beyond 2015 completely misapprehends the most fundamental conclusion of that review. Ultimately, the very first recommendation of the Wilcox Inquiry was that there should be no separate agency like the ABCC/FWBII and by extension no separate powers, but rather that the operations of that body be absorbed into the FWO. This was the only time where the question of the separateness of the FWBII from the FWO was ever considered.

30. In his final report Mr. Wilcox QC dealt with the argument about the administrative and structural context in which any specialist agency would operate in the construction industry. He said:-

> *As I understand the position, the Australian Government is keen to reduce the present proliferation of Commonwealth workplace relations agencies. It would be consistent with that objective for it to make the Specialist Division part of the OFWO. Efficiencies and costs savings should result from amalgamation of what is now the ABCC, with what is now the Office of the Workplace Ombudsman. The amalgamated units could then share not only accommodation and other infrastructure, such as computer and other communications systems, but also expensive supporting services, and financial, human resources, legal and IT personnel.*
>
> *..I considered whether it is possible, without making the new Specialist Division a separate statutory body like the ABCC, to ensure it receives earmarked resources, sufficient to enable it to provide high standard, focussed services to the industry. I raised*

[8] DEEWR Answer to Question no. EW0119_12.
[9] Question EW0125_12
[10] Question EW0124_12
[11] Question EW0126_12

with DEEWR the possibility of the Specialist Division, although within the OFWO, having its own one-line Budget allocation. I was informed this would not be unprecedented but was probably unnecessary.

31. In other words, Wilcox was satisfied that the Parliament, in introducing the Fair Work Act, had recently considered what the federal labour inspectorate should look like and what the necessary and appropriate powers of such a body would be. His view was that whilst there might be some temporary short term focus on the construction industry, this should be through administrative arrangements only and could be carried out through the FWO. There should be no ongoing statutory agency like the FWBII and no ongoing need for coercive powers of the kind provided for by this Bill.

Conclusion

32. There is no good reason to extend the coercive powers of the FWBII for a further two years. The existing powers of inspectors under the FW Act are more than adequate to allow for effective investigation and the enforcement of industrial laws. The FWO has demonstrated beyond any doubt that this is the case. It is an effective industrial regulator with powers suited to an industrial context.

33. The idea that the FWBII should have coercive powers above and beyond those enjoyed by the FWO, especially when it focuses its attention on employee and union conduct, offends against the most basic principle of equality before the law.

34. The promotion of the argument for extending the powers is being undertaken most vigorously by those with a personal interest in seeing a continuation of a separate, politically motivated and taxpayer funded prosecutor of unions and workers.

35. The proper objective would be to do away with these extraordinary powers and return the regulation of the construction industry to the same regime as applies to all other Australian employees and employers.