

10 February 2014

Committee Secretary
Senate Education and Employment Committees
PO Box 6100
Parliament House
Canberra ACT 2600



By email: eec.sen@aph.gov.au

Dear Committee Secretary

The Law Council of Australia is grateful for the opportunity make the following short comments in response to the Senate Education and Employment References Committee's inquiry into the Government's approach to re-establishing the Australian Building and Construction Commission through the *Building and Construction Industry (Improving Productivity) Bill 2013* (the 2013 Bill) and related bills. I note that the Law Council's response is informed by the principles set out in its 2011 *Policy Statement on Rule of Law Principles* (Rule of Law Principles),¹ as outlined below.

The purpose of the 2013 Bill is to re-institute a separate workplace relations framework for the building industry based largely on the Building and *Construction Industry Improvement Act 2005* (the BCII Act). Among other things, the 2013 Bill re-establishes the Australian Building and Construction Commissioner and invests the Commissioner with coercive questioning powers, reintroduces provisions dealing with unlawful industrial action, coercion and the associated civil penalties specific to the building industry, and broadens the scope of these provisions.

The changes proposed by the 2013 Bill to the existing regime are significant. As summarised by the Bills Digest prepared in respect of the Bill:

The Bill not only repeals the [Fair Work (Building Industry) Act 2012] and re-establishes the ABCC, it enlarges both its jurisdictional and industry sector application. It also provides new coercive powers (with retrospective operation), re-introduces a number of criminal and civil penalty offences previously contained in the BCII Act, and introduces a new civil penalty offence of unlawful picketing. It provides for penalties for building industry participants which are considerably higher than those available under the Fair Work Act.

*In effect, the Bill creates (in relation to industrial action and picketing) a new and different set of industrial relations rules that apply only to persons associated with the building and construction industry.*²

The Law Council regrets that it has not been in a position to undertake a detailed analysis of the 2013 Bill and related bills during the time allocated for this inquiry. It also acknowledges that the introduction of the 2013 Bill follows a detailed history of legislative and judicial developments that continue to attract heated public and parliamentary debate. As the Committee would be also be aware, the 2013 Bill has been subject to consideration by the Senate Education and Economics

¹ A copy of these principles is available at <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/PolicyStatementRuleofLaw.pdf>

² Bills Digest *Australian Building and Construction Commission through the Building and Construction Industry (Improving Productivity) Bill 2013* ('the ABCC 2013 Bill') and related bills Bills Digest No. 34, 2013–14 (23 January 2014) available at http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/2958114/upload_binary/2958114.pdf;fileType=application%2Fpdf#search=%22r5129%22

Committee,³ the Senate Standing Committee for the Scrutiny of Bills⁴ and the Joint Parliamentary Committee on Human Rights.⁵

Prior to the introduction of the ABCC 2013 Bill the establishment and subsequent removal of the Australian Building and Construction Commission (ABCC) was also subject to inquiry by a range of public and parliamentary bodies including, a public inquiry in 2007 conducted by Murray Wilcox and a Royal Commission in 2001 led by TRH Cole.

The Law Council is not in a position to comment on the history of the ABCC in this submission, nor does it intend to express a view as to the potential impact of the re-establishment of the ABCC on the building and construction industry. It also has not had the opportunity consider the impact of the 2013 Bill on the rights Australia has assumed as a party to the *International Covenant on Economic, Social and Cultural Rights* and relevant International Labor Organisation conventions which Australia has ratified.

However, even from a preliminary consideration of the 2013 Bill, it is clear that a number of features of the Bill are contrary to rule of law principles and traditional common law rights and privileges such as those relating to the burden of proof, the privilege against self incrimination, the right to silence, freedom from retrospective laws and the delegation of law making power to the executive.

For example, the Law Council notes that the following features of the 2013 Bill have been identified as raising concern by the Senate Standing Committee for the Scrutiny of Bills:⁶

- Clause 120 allows the Minister to make rules by legislative instrument. Clause 5 of the Bill includes a definition of 'authorised applicant', which is a person who is entitled to seek an order relating to a contravention of a civil remedy provision. The definition allows the rules to determine that someone is an authorised applicant, and the Committee comments that it is not clear why this should be left to regulation—or indeed why persons other than the ABC Commissioner or persons affected would need to be authorised. Similarly, the ABC Commissioner has a broad power of delegation to 'a person...prescribed by the rules' (paragraph 19(1)(d)) and the Federal Safety Commissioner has a similar power under paragraph 40(1)(c).
- Clause 43 provides that a Work Health and Safety Accreditation Scheme may be established under the rules. The Scrutiny Committee is concerned that too little detail is set out in the Bill, and the explanatory memorandum does not explain why it is appropriate for the Scheme to be established in this way.
- Paragraph 70(1)(c) provides that the purposes for which an inspector may exercise compliance powers include 'purposes of a provision of the rules that confer functions or powers on inspectors'. The Scrutiny Committee considers that the scope of application of the coercive powers should be specified within the primary legislation.
- There are several instances of reverse onus of proof. For example, action taken by an employee based on health and safety concerns may not be regarded as 'industrial action', but the burden of proof is on the employee to prove that the action was based on the employee's

³ Senate Standing Committees on Education and Employment, *Report into the Building and Construction Industry (Improving Productivity) Bill 2013 and Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013*, 2 December 2013, [1.26], available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/ABCC_2013/report/index

⁴ Senate Standing Committee on the Scrutiny of Bills, *Alert Digest No. 9 of 2013*, 11 December 2013, accessed 18 December 2013.

⁵ While the Joint Parliamentary Committee on Human Rights deferred its consideration of the Bills until after the present inquiry, it expressed the view that the Bills may give rise to "significant human rights concerns". Joint Committee on Human Rights, *Report into the examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, tabled 10 December 2013*, available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/44th/144/~media/Committees/Senate/committee/humanrights_ctte/reports/2013/1_44/b12.ashx

⁶ Senate Standing Committee on the Scrutiny of Bills, *Alert Digest No. 9 of 2013*, 11 December 2013, accessed 18 December 2013.

reasonable concern about an imminent risk to his or her health and safety and that he or she did not unreasonably fail to perform other available work (paragraph 7(2)(c) and subclause 7(4)). The Scrutiny Committee notes that equivalent provision in the Fair Work Act which excludes certain action taken for health and safety reasons from the definition of industrial action (paragraph 19(2)(c) of the Fair Work Act) does not reverse the onus of proof. In civil proceedings under clause 57 to do with unlawful picketing, the person has to establish that their actions were not unlawful. Similarly, if a person wishes to rely on an exception or excuse in civil proceedings, under clause 93 they bear the burden of proof.

- Clause 72 provides for authorised officers to enter premises (including residential premises in some cases) without a warrant. The Scrutiny Committee notes that in general entry should be by consent or under a warrant, and that the explanatory materials do not contain a compelling explanation for a departure from this principle. The Scrutiny Committee notes that subclauses 76(4), 77(4) and 99(8) provide that civil penalties for failure to comply with requests for information do not apply if the person has a reasonable excuse, but that there is no guidance as to what is a reasonable excuse. The Scrutiny Committee raises the question of whether the provision in clause 86 that the rules of evidence and procedure for civil matters (and not those for criminal matters) apply in relation to the civil remedy provisions is consistent with rights associated with a fair trial, but will wait for any views that may be expressed by the Parliamentary Joint Committee on Human Rights.
- The Scrutiny Committee notes that the Bills confer broad powers which in some cases are not sufficiently defined. For example, the Minister is provided with the power to appoint a Commissioner who has 'suitable qualifications or experience' and is of 'good character' (subclause 21(3)); the power of the ABC Commissioner to appoint as a Australian Building and Construction Inspector a 'consultant' (paragraph 66(1)(c)) who has 'suitable qualifications and experience' to be a consultant (clause 32); and the similar power of the Federal Safety Commissioner (subclause 68(1)(c)). The Committee also notes that clause 28 does not require the Minister to provide reasons when terminating the appointment of a Commissioner.

The Law Council shares the Scrutiny Committee's concerns with these features of 2013 Bill which align with the Law Council's Rule of Law Principles, particularly those relating to retrospective operation of laws, reverse onus of proof, and the need for effective oversight of the use of executive power.

The Law Council urges this Committee to await the Minister's response to the issues raised by the Scrutiny Committee in the Alert Digest 9 of 2013 before completing its inquiry and if necessary, extend the opportunity to make submissions in response to the information obtained.

The Law Council also holds particular concerns in respect of Chapter 7 Part 2 of the 2013 Bill that would invest the ABC Commissioner (or his or her delegate) with coercive powers, including powers to require a person to: give information or produce documents to the ABC Commissioner; attend an examination before the ABC Commissioner and answer questions or provide information under oath or affirmation. These powers can be exercised when the ABC Commissioner reasonably believes that the person has information or documents relevant to an investigation by an inspector into a suspected contravention, by a building industry participant, of the 2013 Bill or a designated building law; or is capable of giving evidence that is relevant to such an investigation.⁷

It is an offence to fail to comply with requirements imposed by an examination notice to produce documents, information or attend to answer questions. It is also an offence to fail to take an oath or affirmation when required to do so or to refuse to answer questions relevant to the investigation when being examined. The penalty for these offences is a maximum of 6 months imprisonment.

The 2013 Bill also authorises the appointment of Australian Building and Construction Inspectors, and Federal Safety Officers, (who together are called authorised officers) and invests them with powers to enter premises, ask a person's name and address, and require persons to produce records or

⁷ 2013 Bill Clause 61(1).

documents if he or she reasonably believes that the Act, a designated building law or the Building Code is being breached.

These coercive information gathering powers, and special inspection powers, put a number of common law rights and privileges at risk. For example, clause 102 expressly removes the privilege against self-incrimination by providing that a person is not excused from providing information to the ABC Commissioner because to do so would contravene another law or might tend to incriminate or otherwise expose the person to a penalty or other liability. This is a clear breach of the right to silence and the privilege against self incrimination which is recognised under common law and international law as fundamental right.. Although there are some protections in subclause 102(2) that protect against the use of information disclosed to the ABC Commissioner from being used in certain other proceedings, these limited protections do not appear to be a sufficient safeguard against the misuse of this power and of the information obtained, particularly when the circumstances in which these powers can be exercised is expansive and the thresholds for exercising the powers is low.

The Law Council notes that these types of information gathering powers are of an exceptional and extra-ordinary character that are generally reserved for law enforcement or intelligence agencies responsible for investigating serious criminal activity or threats to national security . Given the intrusive and extraordinary nature of these powers, it is critical that the need for such powers has a strong evidential base and is considered in light of any existing powers that could be used to address the proposed need. It is also critical that if shown to be necessary, such powers are introduced with strict safeguards (such as judicial oversight of the issue of examination notices) to guard against the misuse or overuse of such powers.

In general, law enforcement and intelligence agencies that have been invested with these extraordinary powers also have strict oversight and reporting requirements and are subject to legislative regimes that include certain safeguards relating to the use of such powers.

While the Law Council continues to hold concerns with the use of coercive information gathering powers for law enforcement and intelligence agencies, these concerns are significantly heightened when these powers are invested in other agencies with a much broader range of functions, such as the ABCC, and can be used in the context of investigating and enforcement civil penalties rather than criminal offences. In these circumstances, it is difficult to be confident about the limitations on the use of such powers and the effectiveness of any proposed safeguards.

For example, the Law Council notes that unlike the existing Act, the Bill does not require the ABC Commissioner to apply to the Administrative Appeals Tribunal (AAT) for an examination notice. This means that there is an absence of judicial oversight in the process of authorising the use of the extraordinary coercive information gathering powers described above. In addition, coercive questioning powers can be exercised by a ABC Commissioner or his or her delegate if he or she reasonably believes that the person is capable of giving evidence that is relevant to an investigation in to a breach of a law delegated by regulation.⁸

While an oversight role for the Commonwealth Ombudsman is provided in the 2013 Bill, for example that requires copies of the examination notice to be provided to the Ombudsman and reports to be provided by the Ombudsman to Parliament, the Ombudsman has submitted that this oversight role would need to be extended effective scrutiny of the coercive powers proposed in the 2013 Bill were to be provided. For example, the Ombudsman notes that in light of the lower threshold for authorising the use of such powers and the removal of the requirement to have examination notices approved by the AAT, the Ombudsman would expect to see records relating to the Commissioner's decision to issue notices to ensure that there was reasonable belief that the person has documents or information relevant to an investigation or is capable of giving evidence that is relevant to an investigation.⁹

The Law Council is also concerned that the provisions in Chapter 7 Part 2 may have retrospective effect as they would appear to apply to obtaining information in relation to any contravention or

⁸ See 2013 Bill clause 61(1).

⁹ A copy of the Ombudsman's submission is available at http://www.ombudsman.gov.au/files/OCO_Submission_Inquiry_ABCC.pdf

alleged contravention of either the BCII Act or the FBWI Act that occurred or is alleged to have occurred before the relevant provisions come into effect.

The Law Council considers that the issues raised by the 2013 Bill warrant careful consideration that may not be possible within the current time frame for this inquiry. In particular, the Law Council urges this Committee to conduct a careful analysis of whether each of the above features of the 2013 Bill have been shown to be necessary having regard to the broader industrial legal framework and proportionate in light of the significant impact they have on individual rights and privileges. The Law Council also urges the Committee to have regard to relevant judicial consideration of the previous incarnations of the 2013 Bill, and to the past inquiries into the ABCC.

The Law Council has welcomed the Commonwealth Government's strong interest in the perseverance of traditional rights and freedoms such as those relating to the privilege against self incrimination and onuses of proof, demonstrated by its recent announcement of the Australian Law Reform Commission's inquiry into Commonwealth legislation that may encroach upon these rights and freedoms. In this context, it would be of great concern if legislation was passed without due consideration as to its impact on the full range of these rights and freedoms.

Please do not hesitate to contact me should the Law Council be of further assistance to the Committee.

Yours faithfully

MARTYN HAGAN
SECRETARY-GENERAL