Appendix 1

Correspondence

SENATOR THE HON. ERIC ABETZ
LEADER OF THE GOVERNMENT IN THE SENATE
MINISTER FOR EMPLOYMENT
MINISTER ASSISTING THE PRIME MINISTER FOR THE PUBLIC SERVICE
LIBERAL SENATOR FOR TASMANIA

23 SEP 2014

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Dean,

Thank you for your letter of 26 August 2014, on behalf of the Parliamentary Joint Committee on Human Rights, concerning the Building and Construction Industry (Improving Productivity) Bill 2013.

The Building and Construction Industry (Improving Productivity) Bill 2013 seeks to deliver on the Government's election commitment to re-establish the Australian Building and Construction Commission.

A detailed response to the questions posed by the Parliamentary Joint Committee on Human Rights is enclosed, and I trust this response satisfies any remaining concerns of the Parliamentary Joint Committee on Human Rights.

I also note that this bill and predecessor legislation have been the subject of over a dozen inquiries by various Parliamentary Committees and other bodies over a number of years which have considered similar issues to those your Committee has again recently considered. This has included reviews in 2003, 2004, 2006, 2008, 2009, 2011, 2012, 2013 and, of course, more than one review in 2014.

Should the Parliamentary Joint Committee on Human Rights require further information, please contact my office on (02) 6277 7320.

Yours sincerely

ERIC ABETZ

Encl.

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Our Ref BR14-002918

Building and Construction Industry (Improving Productivity) Bill 2013

Please find below responses to each of the Parliamentary Joint Committee on Human Rights' requests for further information

Prohibition on picketing and restrictions on industrial action - Right to freedom of association and right to form and join trade unions

The Committee has sought my further advice on the proposed prohibition on picketing and restrictions on industrial action and whether these measures are compatible with the right to freedom of assembly and expression and the right to freedom of expression. The Bill will not prevent lawful peaceful assembly.

The Bill's statement of compatibility with human rights and my previous response to the Committee clearly explains the over-arching objective of the Bill–to restore respect for the rule of law in the building and construction industry–and thoroughly sets out the rational connection between the limitations contained in the Bill and this objective.

Existing laws do not adequately regulate the appalling unlawful behaviour that takes place in this industry. The proposed picketing provision will provide a statutory basis for the Australian Building and Construction Commission or directly affected persons to make application to a Court of competent jurisdiction in respect of those engaging in unlawful action, as defined in the Bill; action like that of the CFMEU at the Myer Emporium site in August 2012 which went far beyond an exercise of a right to peaceful assembly and proactively restricted the right of persons to access or leave certain building sites.

In that case, the affected party (Grocon Pty Ltd) took strong and decisive action to seek to enforce and protect its rights. Despite obtaining interlocutory injunctive relief from the Supreme Court of Victoria, the CFMEU-organised conduct continued and ultimately resulted in findings of criminal contempt against the CFMEU. Note, however, that the affected party's underlying substantive claim for compensation for the economic harm inflicted by the conduct is yet to be considered or determined by the Court. There are industry participants who are not able to withstand the economic harm caused by this type of action and do not have the resources to seek and pursue legal remedies to which they are entitled. Some industry participants are also particularly vulnerable to threats of further picketing action should they seek to exercise their rights. Related to the example given above, are allegations made by a contractor to Grocon Pty Ltd that it has suffered retribution from the CFMEU because it sought to protect its interests and exercise its lawful rights (the contractor, Boral Limited, has since commenced its own civil proceedings and its Chief Executive Officer was separately called to give evidence in respect of this circumstance to the Royal Commission into Trade Union Corruption). Whilst noting these matters are still before the Courts and the Royal Commission, if proven, this case is a powerful illustrative example of the practical realities facing the building and construction industry.

Further, section 47 will provide a statutory remedy against defined unlawful picketing which can be pursued by an independent Commonwealth regulator on behalf of affected parties. Whilst directly affected parties are able to make application under the Bill, only very few have the economic resources to enforce their legal remedies and some parties may not seek to pursue legal remedies for fear of future reprisals. Allowing the independent government regulator in the Australian Building and Construction Commission to make application to a Court against parties who engage in unlawful picketing will act as a disincentive to those to who engage in unlawful behaviour and will change the culture of the industry for the better.

Right to privacy – disclosure of information

In relation to sections 61(7) and 105 of the Bill, the Committee has sought additional information on whether there is a rational connection between the limitation and the legitimate objective, and whether the limitation is a reasonable and proportionate measure for the achievement of that objective. The Committee has indicated that it is not satisfied that my response in respect of section 61(7) and 105 demonstrated the need for these provisions.

The legitimate objective of these sections is to grant the Australian Building and Construction Commission sufficient powers and functions to effectively regulate those aspects of the building and construction industry in respect of which the Bill makes the Australian Building and Construction Commission responsible.

Regarding the rational connection between the limitation and the legitimate objective, these provisions (along with the majority of the Bill) are based on the findings of the Cole Royal Commission. This Commission undertook an exhaustive investigation into the conduct of parties in the building and construction industry. As a result of its investigations, the Cole Royal Commission produced 23 volumes of findings and 212 recommendations. Rarely has a more thorough investigation of a sector of the Australian economy been undertaken.

Volume 11 of the Cole Royal Commission gave extensive consideration to the steps that would be needed to achieve cultural change in the building and construction industry. One of the primary recommendations was for the establishment of the Australian Building and Construction Commission. This stemmed from the wide variety of laws and regulators that played a role in the building and construction industry but whose areas of responsibility did not allow for an adequate focus on the industry, or the regulators were hindered by their lack of expertise in dealing with industrial matters in the building and construction industry.[1] Given the wide variety of actors in this field, it would be important for the regulator to operate cooperatively and constructively with other Commonwealth and state agencies.[2]

In considering the role of an Australian Building and Construction Commission in achieving cultural change in the industry, the Cole Royal Commission noted that:

> *The ABCC can be expected to become aware of contraventions of the law within the industry in various ways...Many of the submissions received by the Commissioner suggested that the ABCC should be a 'one stop shop' to which anyone complaining of misconduct in the industry could have resort. I consider that these submissions have merit. This does not necessarily mean that every complaint which is received must be dealt with by ABCC staff. It may be that, depending on the nature of the complaint, there is another agency which might more appropriately respond.*[3]

To do this, it is essential for the Australian Building and Construction Commission to have the ability to share information with other Commonwealth, state and territory agencies in carrying out the functions and powers provided to it by the Bill. It is also essential that the Australian Building and Construction Commission's ability to obtain and share information is not unnecessarily delayed or hindered by uncertainty about whether other laws dealing with secrecy or privacy provisions prevent the disclosure of relevant information when the Bill contains its own protections regarding the use and disclosure of such information.

[1] Volume 11, page 27
[2] Volume 11, page 30
[3] Volume 11, p. 31

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LIBERAL SENATOR FOR TASMANIA

Senator Dean Smith
Chairman,
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

22 SEP 2014

Dear Senator Smith Dean,

Thank you for your letter of 26 August 2014 requesting advice in relation to the Parliamentary Joint Committee on Human Rights' review of the Commonwealth Cleaning Services Guidelines Repeal Instrument 2014. From the outset, I note that this instrument is not a disallowable instrument.

The repeal of the Commonwealth Cleaning Services Guidelines (Guidelines) has no relevance to wages and conditions for workers in the industry as a whole. The Guidelines were an internal purchasing policy that only applied to some buildings occupied by some Australian Government agencies. There were only ever around 25 to 30 cleaning contracts influenced by the Guidelines across Australia, covering less than one per cent of employees in the industry, Australia-wide.

It was not the Guidelines but Australia's workplace relations laws, including the modern award system, that provide for fair and decent wages and strong safeguards for all cleaners, no matter where they work. Government intervention in this matter by the previous Government was effectively a vote of no confidence in the Fair Work Commission which sets the wages for all workers, including through the Cleaning Services Award 2010. In fulfilling this role, the Fair Work Commission sets fair and decent wages based on a range of economic factors in the *Fair Work Act 2009*. This includes taking into account the relative living standards of the low paid and the need to encourage enterprise bargaining. If anything, the former Government set a very dangerous precedent by having the Minister of the day seeking to set wages and conditions in a particular sector. I note that these wages and conditions were essentially the same as those contained in the preferred enterprise agreement of the United Voice union.

For the less than one per cent of employees in the industry that are actually working under contracts covered by the Guidelines, there will not be a pay cut. The terms and conditions of all current cleaning contracts, and enterprise agreements that stipulate rates of pay and conditions, will continue to apply. Importantly, enterprise agreements can only be made with a majority of employees' consent and employees must be better off overall in comparison with the relevant award.

Cessation of the Guidelines will not preclude employers from continuing to pay their employees above award pay rates or negotiating other terms and conditions through enterprise agreements, something which also happened prior to the Guidelines. Government agencies also continue to have the flexibility to engage cleaning companies that provide above award wages and conditions—as was commonly the case prior to the existence of the Guidelines. There were at least 65 such cleaning contracts incorporating the higher pay rates prior to the commencement of the Guidelines.

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It is noted that the Guidelines also required that each new employee to be covered by the Guidelines be given information about union membership by union officials. It is disappointing that the Committee has not previously considered whether this may contravene the *Freedom of Association and Protection of the Right to Organise Convention, 1948* (No. 87).

I hope that this correspondence clarifies the facts in relation to the Commonwealth Cleaning Services Guidelines Repeal Instrument 2014.

Yours sincerely

ERIC ABETZ

The Hon Scott Morrison MP
Minister for Immigration and Border Protection

Senator Dean Smith
Chair
Parliamentary Joint Standing Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator

Response to questions received from Parliamentary Joint Committee on Human Rights

Thank you for your letters of 26 August 2014 in which further information was requested on the following bill and legislative instrument:

- *Migration Legislation Amendment Bill (No. 1) 2014*; and
- *Migration Amendment (2014 Measures No. 1) Regulation 2014* [F2014L00286].

My response to your requests is attached.

I trust the information provided is helpful.

Yours sincerely

The Hon Scott Morrison MP
Minister for Immigration and Border Protection
19/9/2014

Migration Legislation Amendment Bill (No. 1) 2014 – Schedule 3

"Accordingly, the committee seeks the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 3 of the bill with the rights to equality and non-discrimination on the grounds of race or ethnicity."

As acknowledged in my response to the Committee's comments in its Seventh Report, the amendments to section 262 in the bill are concerned with the conviction of a people smuggler or foreign fisher of an offence against a law in force in Australia. They are not connected with a person's race or ethnicity, or with any other personal characteristic, but only with offences that they have been convicted of. This is evidenced by the fact that proposed paragraphs 262(1)(a), (b) and (ba) are worded specifically to apply to a person who is, or has been, detained under section 189, was on board a vessel (not being an aircraft) when it was used in connection with the commission of an offence against the Migration Act or against a prescribed law in force in the Commonwealth or in a State or Territory, being a law relating to the control of fishing, and is convicted of the offence. The amendments are not inconsistent with the rights to equality and non-discrimination on the grounds of race or ethnicity, and do not amount to either direct or indirect discrimination.