



Australian Government

Department of Employment

**SENATE STANDING COMMITTEE ON
EDUCATION AND EMPLOYMENT**

**Building and Construction Industry
(Improving Productivity) Bill 2013**

**Building and Construction Industry
(Consequential And Transitional
Provisions) Bill 2013**

INTRODUCTION

1. The Department of Employment welcomes the opportunity to make a written submission to the Senate Standing Committee on Education and Employment Inquiry into the Building and Construction Industry (Improving Productivity) Bill 2013 (the Bill) and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013.
2. The Bills were introduced into the House of Representatives on 14 November 2013. They give effect to the Government's *Policy to Improve the Fair Work Laws*, in which the Government committed to re-establish the Australian Building and Construction Commission to once again ensure the rule of law and productivity on building sites and construction projects, whether on-shore or off-shore.
3. It is intended the re-established Australian Building and Construction Commission will commence its operations on 1 January 2014.
4. The Bill is largely modelled on the *Building and Construction Industry Improvement Act 2005*.
5. The key provisions of the Bill provide for:
 - coverage of 'building work' which includes the off-site prefabrication of made-to-order components for parts of buildings, structures or works and the transport and supply of goods and materials directly to building sites to be used in building work;
 - the re-establishment of the Australian Building and Construction Commissioner and Commission, to replace the Fair Work Building Industry Inspectorate;
 - a Building Code, and a Work Health and Safety Accreditation Scheme for Commonwealth funded work;
 - prohibitions relating to unlawful industrial action, unlawful picketing, coercion and discrimination;
 - an enforcement regime including penalties for breaches of the Act and a broad range of remedies which may be accessed by affected persons or the Australian Building and Construction Commission. These penalties and remedies are modelled on the *Building and Construction Industry Improvement Act 2005*;
 - the power for the Australian Building and Construction Commissioner to compel witnesses to attend an examination or to produce documents where he/she reasonably believes that the person has information or documents relevant to an investigation into a suspected contravention of workplace relations laws, with those powers to be subject to certain safeguards to protect the rights of individuals;
 - the Commonwealth Ombudsman to monitor and review all examinations and provide reports to the Parliament on the exercise of this power; and
 - inspector powers, modelled on the powers provided to Fair Work Ombudsman Inspectors under the *Fair Work Act 2009*.

PURPOSE OF THE SUBMISSION

6. In this submission, the Department of Employment will provide detail on key aspects of the Bill and the Government's policy underpinning those aspects.
7. The submission will also respond to a number of issues that have been raised by various stakeholders preceding the Bill's introduction to the Parliament.

CONSULTATION

8. Exposure drafts of the Bill were circulated to and discussed with employer organisations and unions during confidential consultation sessions facilitated by the Department on 30 October 2013.
9. The Department also consulted with employer organisations and unions on the provisions of the Building and Construction Industry (Consequential and Transitional) Bill 2013 on 4 November 2013.
10. The Minister for Employment, the Hon. Eric Abetz, discussed the Bill with the Select Council on Workplace Relations at the meeting of 1 November 2013. The Minister will update the National Workplace Relations Consultative Council at the meeting of 25 November 2013.
11. The Government consulted on its policy while in Opposition ahead of the policy announcements in 2010 and 2013 to re-establish the Australian Building and Construction Commission.
12. The Minister was also informed by the *Taskforce to Re-establish the Australian Building and Construction Commission* and its report provided to the then Leader of the Opposition, the Hon. Tony Abbott MHR.

POLICY OBJECTIVES OF THE BILL

13. The construction industry provides many jobs for workers in both small businesses and large enterprises. It is critical to a productive, prosperous and internationally competitive Australia. The Government's second reading speech stated that it recognises the importance of an industry that is vital to job creation and essential to Australia's economic and social well-being.
14. The Government has stated that the need to re-establish the Australian Building and Construction Commission underpinned by provisions put in place in 2005 is clear.
15. The Government's stated view is that, as with the provisions of the *Fair Work Act 2009* relating to the textile, clothing and footwear sector, where certain industries face distinctive industrial relations challenges, special circumstances require special laws.
16. While the Australian Building and Construction Commission existed, the economic and industrial performance of the building and construction industry significantly improved. For example, a 2013 Independent Economics report¹ on the state of the sector during this period found that:
 - building and construction industry productivity grew by more than 9 per cent;
 - consumers were better off by around \$7.5 billion annually; and

¹ Independent Economics, *Economic Analysis of Building and Construction Industry Productivity: 2013 Update*

- fewer working days were lost through industrial action.

17. The main object of the Bill is to provide an improved workplace relations framework for building and construction work to ensure that it is carried out fairly, efficiently and productively for the benefit of all building industry participants and for the benefit of the Australian economy as a whole.

18. The Government has stated that a re-established Australian Building and Construction Commission will also better support workers by creating a workplace which is free of intimidation and bullying.

19. An object of the Bill is also to improve the bargaining framework so as to further encourage genuine bargaining at the workplace level. The Bill aims to promote respect for the rule of law and ensures respect for the rights of all building industry participants. The Bill contains provisions to ensure that unlawful action, including unlawful industrial action and unlawful pickets, is addressed. The Bill includes the ability for the courts to impose significant penalties for individuals and organisations that participate in unlawful action.

20. The Bill strengthens existing provisions for investigating and enforcing the law. The Australian Building and Construction Commissioner will be able to exercise their power to obtain information quickly and effectively. However, to ensure accountability and transparency, the use of these powers will continue to be reviewed and reported on by the Commonwealth Ombudsman.

21. The Government's second reading speech stated that it is committed to ensuring the rule of law is maintained. As the 2003 Royal Commission into the Building and Construction Industry (the Royal Commission) concluded, the behaviour often seen in the building and construction industry marks it as singular. It is an industry in which conventional standards of commercial and industrial behaviour do not apply.

AGENCY FUNDING

22. The Government's *Policy to Improve the Fair Work Laws* committed to re-establishing the Australian Building and Construction Commission to its former structure. To give effect to this, an additional \$5 million appropriation will be allocated to the re-established Australian Building and Construction Commission in 2013-14 rising to an additional \$10 million per annum in subsequent years.

BUILDING CODE

23. The Government's *Policy to Improve the Fair Work Laws* also states that the Australian Building and Construction Commission will administer a national code and commits to working with the state governments who have put in place their own codes to ensure consistency.

24. The Bill allows for the Minister to issue a Building Code.

25. The re-established Australian Building and Construction Commission will administer a new Building Code, which will govern industrial relations arrangements for Australian Government-funded projects. This will ensure that taxpayers' dollars are used efficiently.

26. A new statutory code is being developed, in consultation with both industry stakeholders and state governments, which is intended to commence at the same time as the re-established Australian Building and Construction Commission.

27. Several states have expressed the need to have their own stand-alone building code schemes and that these arrangements can provide substantial benefits in the management of procurement processes for state-funded building work. The Government has stated that its intention is for state-based codes to continue to operate alongside the new national code.

SUMMARY OF PROVISIONS

Commissioner

28. The Bill will re-establish the Australian Building and Construction Commission. It will be led by its Commissioner, who will have the functions under the Bill of monitoring, promoting and enforcing appropriate standards of conduct by building industry participants and referring matters to other relevant agencies and bodies as required.

29. The Australian Building and Construction Commissioner will be responsible for investigating suspected contraventions of the law by building industry participants. The Commissioner will also institute or intervene in proceedings in accordance with these laws and provide assistance and advice to building industry participants on their rights and obligations under designated building laws.

30. The Australian Building and Construction Commissioner will be supported by Deputy Commissioners, and by a statutory agency, to be known as the Australian Building and Construction Commission, comprising persons engaged under the *Public Service Act 1999*.

Definition of Building Work

31. The definition of building work in the Bill includes off-site prefabrication of made-to-order components for parts of buildings, structures or works.

32. The definition of building work also includes the transporting or supplying of goods directly to building sites to be used in building work. This is a change from the previous Australian Building and Construction Commission's underpinning legislation and is included to ensure that large resource construction projects cannot be indirectly disrupted through coordinated restrictions or bans on the supply of materials to those projects.

33. The Bill extends the definition of building work to the exclusive economic zone and waters above the continental shelf.

Re-instatement of Industry Specific Penalties

34. The Government's second reading speech states that changing the lawless culture of the building and construction industry requires strong regulation, a strong regulator and penalty levels that will act as a deterrent to unlawful behaviour.

35. The Bill provides for higher penalties and a deterrent to unlawful industrial action, unlawful picketing, and coercion and discrimination. These industry specific penalties were a key recommendation of the Royal Commission.

36. The Courts will determine the appropriate penalty to apply within the limits set out in the legislation as informed by considerations of proportionality.

Coercive Powers

37. The Bill enables the Australian Building and Construction Commissioner to compel witnesses to attend an examination or to produce documents where he/she reasonably believes that the person has information or documents relevant to an investigation into a suspected contravention of workplace relations laws.

38. These powers will ensure the Australian Building and Construction Commission is able to carry out its investigations effectively. The coercive powers in the Bill were recommended by the Royal Commission, which noted that the Australian Building and Construction Commission would “need to penetrate the veil of silence behind which many decisions to take unlawful action are hidden”.

39. The Bill also provides strong powers to Australian Building and Construction Commission’s inspectors, which have been effectively modelled on the powers granted to Fair Work Inspectors contained in the *Fair Work Act 2009*.

Safeguards

40. The Bill provides strong means for investigating and enforcing the law. To ensure accountability and transparency, the use of the coercive examination powers will continue to be reviewed and reported on by the Commonwealth Ombudsman.

41. The Bill requires the Australian Building and Construction Commissioner to provide the Commonwealth Ombudsman with a report about the examination along with a video recording and transcript of the examination. At the end of each financial year, the Commonwealth Ombudsman is required to prepare and present to the Parliament, a report about examinations during the year. This will ensure public transparency and accountability and give the community confidence in the work of the Australian Building and Construction Commission.

42. In recognition of the serious nature of the coercive powers, the Bill provides for use and derivative use immunity in relation to information obtained through the use of these powers. This ensures that information obtained cannot be used against the person in most criminal or civil proceedings.

43. The Bill provides that notices requiring individuals to attend an examination can only be issued with at least 14 days notice and that any person appearing is entitled to legal representation.

44. The powers under this act are similar to those granted to a range of other Commonwealth regulatory bodies such as the Australian Competition and Consumer Commission, the Australian Prudential Regulation Authority, the Australian Securities and Investment Commission, the Australian Taxation Office, Centrelink and Medicare. A comparison of the powers available to Centrelink and Medicare is at Attachment A.

Payment of Reasonable Costs

45. The Bill provides that a person who attends an examination as required by an examination notice is entitled to payment for reasonable expenses incurred by the person in attending the examination. Reasonable expenses will cover matters such as travel and accommodation expenses.

46. The method for calculating the fees and allowances a person may be paid will be prescribed by the rules, as made by the Minister. A person will only be entitled to reasonable expenses. To that end, the rules will prescribe maximum amounts that are payable in relation to travel or accommodation expenses rather than guaranteeing payment of all expenses actually incurred by a person.

47. During consultation on the Bill, stakeholders were supportive of including provision for the reimbursement of reasonable costs associated with attendance at an examination.

Right to Legal Representation

48. The Bill provides that where a person has been required to attend before the Australian Building and Construction Commissioner or before an assistant, the person may be represented by a lawyer if the person chooses. This ensures that the person in question is not disadvantaged and is able to be appropriately supported.

49. The time for an examination to take place must be at least 14 days after the notice is given, ensuring that the person on whom the notice is served will have an adequate opportunity to seek advice and arrange legal representation if they so choose.

Unlawful Behaviour

50. The Bill aims to address unlawful behaviour and there are significant penalties for taking unlawful industrial action, or for engaging in, or organising, an unlawful picket.

51. The Bill provides that a person must not organise or engage in an unlawful picket. This was not a feature of any predecessor Acts and has been included in the Bill to address the disruptions to the building industry caused by picketing. Picketing will be unlawful under the Bill if it is motivated by one of the purposes set out in the Bill or is otherwise unlawful. Action that seeks to draw attention to a social, environmental or community issue, for example, will not be unlawful unless the action involves unlawful behaviour such as trespass.

52. The Bill also reinstates civil remedy provisions in relation to coercion and discrimination and makes it clear that project agreements are unenforceable where the intention is to secure standard employment conditions relating to a particular site or sites covering employees from different enterprises. These types of project agreements inhibit genuine enterprise bargaining.

Federal Safety Commissioner and the Australian Government Building and Construction WHS Accreditation Scheme

53. The Government has stated that it will use its influence as a funder of large building and construction projects nationally to lead the way on improving work, health and safety standards and culture throughout the building and construction industry.

54. For this reason, the Bill retains the role of the Federal Safety Commissioner and the *Australian Government Building and Construction Industry WHS Accreditation Scheme*.

HUMAN RIGHTS AND INTERNATIONAL LABOUR ORGANISATION

55. The Government has stated that the measures introduced by the Bills are necessary, reasonable and proportionate and that they contain appropriate and effective safeguards to ensure due process and transparency.

56. The Government has stated that there is a demonstrated need for effective, industry-specific regulation to ensure the rights and obligations of building industry participants, including employees, employers, contractors and their representatives are respected.

TRANSITIONAL AND CONSEQUENTIAL PROVISIONS

57. The key provisions of the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 will:

- repeal the *Fair Work (Building Industry) Act 2012*;
- make minor consequential amendments to Commonwealth legislation that are relevant to the operation of the Building and Construction Industry (Improving Productivity) Bill 2013; and
- make transitional provisions for: changes of names of institutions and offices; preserving the appointments of senior position holders; preserving the employment entitlements of staff of affected organisations; preserving the confidentiality of certain information; the timing of reports; preserving the existing safety accreditation scheme; preserving examination notices and their effect; legal proceedings and other related matters.

Type of power	Reasons for use	Power used against/Legal Representation	Limitations	Who has the power	Contents of notice	Notice period	Privilege against self-incrimination	Legal professional privilege	Review rights
MEDICARE									
<i>Human Services (Medicare) Act 1973, s 8P</i>									
Provide information, produce documents	Reasonable grounds for believing an offence has been or is being committed and that information or document is relevant	A person/Not provided for in the legislation	Not required to produce records containing a patient's clinical details (s 8P(3) subject to exceptions (s 8P(4)))	An authorised officer	Specify time, manner and officer for providing information or time and place for giving evidence (s 8Q)	At least 14 days (s 8Q)	Not available. But can use immunity for evidence or information in criminal proceedings (s 8S)	Reasonable excuse defence (s 8R). No specific abrogation of the privilege	Review of a decision to issue a request for information available under the AD(JR) Act
CENTRELINK									
<i>Student Assistance Act 1973, s 345 (example only)</i>									
Provide information, produce documents	Secretary believes person may have information or document relating to debtor to the Commonwealth	A person/Not provided for in the legislation	Information must be relevant to financial situation or location of a debtor	Secretary	Specify time, manner and officer for providing information or time and place for giving evidence (s 347)	At least 14 days (s 347)	Reasonable excuse defence (s 347). No specific abrogation of the privilege	Reasonable excuse defence (s 347). No specific abrogation of the privilege	Not reviewable by SSAT (s 313). Review by Secretary if satisfied of sufficient reason to review (s 303) Review of a decision to issue a request for information available under the AD(JR) Act
AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION									
<i>Building and Construction Industry (Improving Productivity) Bill 2013, s61</i>									
Provide information, produce documents	ABC Commissioner reasonably believes person has information or documents relevant to an investigation or suspected contravention the Act or a designated building industry law by a building industry participant	A person/Legal representation permitted by the Bill	Information must be relevant to an investigation or suspected contravention	ABC Commissioner, Deputy ABC Commissioner, SES employee if no Deputy Commissioner appointed	Specify time, manner and officer for providing information or time and place for giving evidence (s 61(2))	At least 14 days (s 61(2))	Not available. But can use immunity for evidence or information in criminal proceedings (s 90)	No specific abrogation of the privilege	Not specified, however Commonwealth Ombudsman to review the exercise of powers and report to the Parliament