



Australian Government

Department of Employment

SENATE STANDING COMMITTEE ON
EDUCATION AND EMPLOYMENT

INQUIRY INTO THE CONSTRUCTION INDUSTRY AMENDMENT
(PROTECTING WITNESSES) BILL 2015

SUBMISSION OF THE
DEPARTMENT OF EMPLOYMENT

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Introduction

1. The Department of Employment (the Department) welcomes the opportunity to make a written submission to the Senate Education and Employment Legislation Committee inquiry into the Construction Industry Amendment (Protecting Witnesses) Bill 2015 (the Protecting Witnesses Bill).
2. The Protecting Witnesses Bill was introduced into the Senate on 25 March 2015 and amends the *Fair Work (Building Industry) Act 2012* to extend by two years the period during which the Director of the Fair Work Building Industry Inspectorate (the Director) can apply to a nominated Administrative Appeals Tribunal (AAT) presidential member for an examination notice.
3. Under the *Fair Work (Building Industry) Act 2012*, the Director may apply to a nominated AAT presidential member for the issue of an examination notice in order to obtain information relevant to an investigation into a suspected contravention of a designated building law or a safety net contractual entitlement by a building industry participant. An examination notice may require a person to provide certain information or documents to the Director, or to attend before the Director to answer questions relevant to an investigation not less than 14 days after the examination notice is given to the person.
4. Section 46 of the *Fair Work (Building Industry) Act 2012* currently has the effect that the Director cannot apply for an examination notice after 1 June 2015.
5. The Protecting Witnesses Bill amends the *Fair Work (Building Industry) Act 2012* to extend the period during which the Director can apply to a nominated AAT presidential member under section 45 for an examination notice by two years. It also inserts a note explaining that the effect of section 46, as amended, is that applications cannot be made under section 45 after 1 June 2017.
6. The Australian Government has stated it remains committed to the Bills to re-establish the Australian Building and Construction Commission that are currently before the Parliament. The Government has also stated it remains firmly committed to the advance release of the Fair and Lawful Building Sites Code which will be administered by the Australian Building and Construction Commission.
7. Until such time as the Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 come into effect, the Protecting Witnesses Bill will ensure there is no gap in the ability of the Director of the Fair Work Building Industry Inspectorate to exercise compulsory information gathering powers. All other aspects of the current legislation will remain unchanged, including the significant safeguards and immunities given to a witness over their evidence.

Purpose of this submission

8. This submission explains the origins of the compulsory information gathering powers, the ongoing need for the powers and outlines the examination notice process and the range of measures available to protect the rights of individuals (including workers) who have been given a notice to provide information, produce documents or attend before the Director to answer questions.

History of compulsory information gathering powers

9. The ability to exercise the compulsory information gathering powers was a central recommendation of the 2003 Cole Royal Commission into the Building and Construction Industry following an extensive investigation of the lawlessness facing the industry. This recommendation was made on the basis that it was necessary to 'penetrate the veil of silence behind which many

decisions to take unlawful industrial action are hidden'.¹ The powers were first given to the Secretary of the then Department of Employment and Workplace Relations in 2004 and then to the Australian Building and Construction Commissioner in 2005 and most recently the Director of the Fair Work Building Industry Inspectorate in 2012. The powers being extended by the Bill have existed in legislation introduced by both Coalition and Labor Governments.

10. This power has been used effectively by the Australian Building and Construction Commission and the Fair Work Building Industry Inspectorate, with a total of 224 examinations having been conducted between 1 October 2005 and 31 March 2015. Of these:

- 102 examinations relate to 44 matters in which penalty proceedings have been instituted in a court;
- 5 examinations relate to a section 67 (ABC Commissioner to publish non-compliance) report published by the Australian Building and Construction Commission;²
- 104 examinations relate to other closed matters (no court proceedings or section 67 report); and
- 13 examinations relate to one ongoing investigation.

11. The ongoing necessity of the compulsory information gathering powers was further recognised by the Honourable Murray Wilcox QC in his 2009 report titled *Transition to Fair Work Australia for the Building and Construction Industry*, where he stated that:

It is understandable that workers in the building industry resent being subjected to an interrogation process, that does not apply to other workers, designed to extract from them information for use in penalty proceedings against their workmates and/or union. I sympathise with that feeling and would gladly recommend against grant of the power. However, that would not be a responsible course. I am satisfied there is still such a level of industrial unlawfulness in the building and construction industry, especially in Victoria and Western Australia, that it would be inadvisable not to empower the [regulator] to undertake compulsory interrogation. The reality is that, without such a power, some types of contravention would be almost impossible to prove.³

12. Justice Wilcox further stated:

Most of the completed [court] proceedings have been successful; many because of information acquired by the Australian Building and Construction Commission at compulsory interrogations.^{4 5}

13. Justice Wilcox also noted that, whilst there was a present need for the powers to be available to the regulator, this may not always be the case:

¹ *Royal Commission into the Building and Construction Industry* (2003), Volume 11, Page 38.

² Section 67 was repealed and disclosure provisions are now contained in section 64 of the *Fair Work (Building Industry) Act 2012*.

³ Justice Murray Wilcox (2009), *Transition to Fair Work Australia for the Building and Construction Industry Report*, Page 3.

⁴ *Ibid*, Page 1.

⁵ Note that the Fair Work Building Industry Inspectorate data shows that of the 231 court proceedings commenced by the Building Industry Taskforce, the Australian Building and Construction Commission and the Fair Work Building Industry Inspectorate, the combined success rate is ninety-one percent.

...it seems to me, that any tough new regulator in the building and construction industry will need a power of coercive interrogation; at least under present conditions.

However, the position may change. Even some of the employer associations concede it may not always be necessary for the regulator to have a coercive interrogation power. They suggest it may be desirable to review the situation in (say) five years and, for that purpose, impose a sunset clause on the relevant part of the new legislation. I think there is merit in this.⁶

14. On this basis, Justice Wilcox also recommended that the compulsory information gathering powers be subject to review and a five year sunset clause. The then Government adopted this recommendation and included a 'sunset' provision of three years when it retained the compulsory powers in the *Fair Work (Building Industry) Act 2012*. This reflected the fact that these powers had already been in operation in respect of the building industry since the time of the Building Industry Taskforce, which operated from October 2002 to October 2005.⁷

15. Therefore, the intention behind the 'sunset' provision was not that the Director's ability to compulsorily gather information cease, rather the intention (as explained in the Explanatory Memorandum to the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2012) was that, before the end of the sunset period, the Government would undertake a review into whether the compulsory examination powers continue to be required given the state of conduct in the building and construction industry. In developing the Bills currently before the Senate to re-establish the Australian Building and Construction Commission, careful consideration was given to the ongoing need for the powers. The Government considered that, given there continues to be a culture of fear of reprisal and silence, and that lawlessness, intimidation and thuggery continue to plague the sector, it would be irresponsible not to retain the powers.

The examination notice process and available protections

16. Under section 45 of the *Fair Work (Building Industry) Act 2012*, the Director may apply to a nominated AAT presidential member for the issue of an examination notice if the Director believes on reasonable grounds that a person has information or documents or is capable of giving evidence relevant to an investigation.

17. An examination notice may require a person to provide information or produce documents to the Director, or appear before the Director and answer questions relevant to the investigation. The Director's ability to apply to the AAT presidential member to issue an examination notice cannot be delegated. The Director's power to conduct an examination can only be delegated to a Senior Executive Service employee. These restrictions ensure that appropriate limitations are placed on the delegation of this power.

18. The issue of an examination notice is dependent upon a nominated AAT presidential member being satisfied as to a range of matters including that other methods for obtaining the information or evidence have been attempted and have been unsuccessful or are not appropriate.⁸

19. The use of the compulsory information gathering powers is subject to a range of other protection measures designed to protect the rights of individuals including:

⁶ The Hon. Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction Industry* (2009), paragraphs 5.109 – 5.110.

⁷ Note also, similar compulsory powers were available to other regulators during this period, and earlier, in other industries.

⁸ For the full list of matters, see section 47 of the *Fair Work (Building Industry) Act 2012*.

- a person required to attend an examination has at least 14 days written notice that they will need to appear and there is the flexibility to set an alternative time;
- a person required to attend an examination is entitled to be represented by a lawyer;
- a person required to attend an examination will be reimbursed for their reasonable expenses including legal representation, travel, accommodation and lost earnings;
- a person who discloses information in good faith under an examination notice is protected from proceedings for contravening any other law and from civil action for damages because of that disclosure;
- although a person cannot refuse to provide information on the grounds that it might incriminate them or contravene another law, the person is protected because any information, answers or documents given pursuant to a notice is inadmissible in most criminal or civil court proceedings against them;^{9 10}
- designated officials must keep any information acquired under an examination notice confidential. There are also stringent requirements on the use and disclosure of information obtained through the examination notice process and disclosure can only be made in very limited circumstances, for example if the disclosure is for the purposes of the performance of the Fair Work Building Industry Inspectorate's powers. Misuse of information obtained under an examination notice by designated officials (including officials of the Inspectorate) can result in a term of imprisonment of up to 12 months and/or a pecuniary penalty of up to \$10,200.¹¹
- the Director cannot require a person to give an undertaking not to disclose information or answers given at the examination or discuss the matters relating to the examination with another person;
- all examinations are videotaped and a video and transcript of the examination is given to the Commonwealth Ombudsman for review; and
- the Commonwealth Ombudsman is required to report to Parliament at least annually on the exercise of the powers.¹²

Failure to attend an examination

20. Non-compliance with a notice when required to do so constitutes an offence. This offence is punishable by a maximum term of imprisonment for six months. Subsection 4B(2) of the *Crimes Act 1914* establishes a formula by which a term of imprisonment can be converted into a pecuniary penalty. The formula multiplies the number of months of imprisonment by five. The resulting number is the number of penalty units used to calculate the maximum pecuniary penalty. Section 4AA of the *Crimes Act 1914* provides that a penalty unit is \$170. This would make the maximum

⁹ The exceptions to this otherwise complete immunity relate to a witness knowingly perjuring themselves by giving false testimony or refusing to answer questions or obstruction of Commonwealth public officials; see subsection 53(2) of the *Fair Work (Building Industry) Act 2012*.

¹⁰ Note also, a person is not required to give information or answer questions if to do so would disclose information that is subject to either legal professional privilege or would be protected by public interest immunity. See subsection 52(3).

¹¹ Note also, to preserve the integrity of ongoing investigations and the preparation of legal proceedings, it is not in the interests of the regulator to publicise or disclose information given under examinations until that information is ready to be formally presented in Court.

¹² These reports can be found at <http://www.ombudsman.gov.au/pages/publications-and-media/reports/fair-work-building-industry/index.php>

pecuniary penalty for this offence 30 penalty units or \$5,100. This represents the maximum that a person may be penalised and is subject to judicial discretion.

21. Similar penalty regimes also apply to the exercise of compulsory powers that are available to other Commonwealth regulators.

Continuing need for compulsory powers

22. During questioning in Supplementary Budget Estimates 2014-15, the Director of the Fair Work Building Industry Inspectorate was asked about the level of unlawful conduct in the industry compared to 2008. The Director gave evidence that “it is a worsening problem. There has been a burgeoning increase in unlawful conduct. There has been an increase in investigations that have to be carried out by my agency and an increase in the matters that we placed before the Court...”¹³

23. The Fair Work Building Industry Inspectorate data show an increase of 145 per cent in the number of investigations on hand in the period from 1 March 2013 to 1 March 2015.

24. The information obtained through examination notices allows the Fair Work Building Industry Inspectorate to assess whether breaches of the law may have occurred and to make an informed judgement about whether to commence proceedings or take other steps to ensure compliance with the law.

25. The Fair Work Building Industry Inspectorate has advised that information obtained through the examination notice process is used to determine whether or not to initiate court proceedings. The information obtained either results in a decision to progress investigations and put matters before the court for determination or not to proceed further, thereby sparing the proposed respondent from the burden of court proceedings and avoiding unnecessary use of the regulator’s and the court’s resources.

26. The current Director, Mr Nigel Hadgkiss, has highlighted that the compulsory examination powers are not issued in respect of persons suspected of contravening the law. Given the immunities that apply to the person providing information during an examination, this is a matter of logic. Rather, they are used to assist in obtaining information from witnesses who may have information relevant to an investigation. The powers are an effective tool in establishing the facts in relation to incidents and determining which cases warrant litigation. In evidence given to the Education and Employment Legislation Committee, Mr Hadgkiss has stated there is a great reluctance on the part of witnesses to provide voluntary statements or affidavit for fear of retribution for speaking out.¹⁴ Mr Hadgkiss has also stated that the powers are used as a last resort and are invariably invoked at the request of the victim or witness of unlawful conduct.¹⁵ Out of the 224 examination notices issued, 67 per cent were issued in respect of employees.¹⁶

27. Mr Hadgkiss also gave evidence in relation to a flyer produced by the Construction, Forestry, Mining and Energy Union (CFMEU) titled ‘*What to do if the FWBC is on your job*’. Hansard from the Committee hearing records the content of the flyer. It stated: “Do not approach or talk to [FWBC] inspectors”, “under the law you have no obligation to speak with [FWBC] inspectors”, and “don’t

¹³ Education and Employment Legislation Committee – Senate Estimates, 23 October 2014, page 84.

¹⁴ Education and Employment Legislation Committee – Senate Estimates, 23 October 2014, pages 103-104.

¹⁵ Address to the Industrial Relations Society of Western Australia, State Conference, 23 November 2013.

¹⁶ Data provided to the Department of Employment by Fair Work Building and Construction for the period 1 October 2005 to 30 June 2014 (the additional breakdown percentages are: Management (27%), Union Officials (5%), Independent Witnesses (0.5%), Government Officials (0.5%)).

take part in an interview". Mr Hadgkiss stated that such advice from the union is commonplace and that such behaviour thwarts investigations.¹⁷

28. A former Director of the Fair Work Building Industry Inspectorate, Mr Leigh Johns, stated during his term of office that "the reality is that, without such a power, some types of contravention would be almost impossible to prove because the 'culture of silence' in the industry continues".¹⁸

29. An interim report of the Royal Commission into Trade Union Governance and Corruption was tabled in Parliament on 19 December 2014. The Interim Report, comprising three volumes, makes a number of recommendations including that consideration should be given to laying a number of charges, including criminal charges, against a range of CFMEU officials in relation to acts of intimidation, coercion and blackmail.

30. The third volume of the Interim Report has not been released publicly due to concerns about the safety of certain individuals named in the volume.

31. Part 8 of the interim report contains a number of case studies associated with the CFMEU. The report states that "together they raise fundamental issues about the regulation of the building and construction industry, and the culture of wilful defiance of the law which appears to lie at the core of the CFMEU".¹⁹

32. The interim report goes on to say that "the evidence in relation to the CFMEU case studies indicates that a number of CFMEU officials seek to conduct their affairs with a deliberate disregard for the rule of law" and that:

- "officials prefer to lie rather than reveal the truth and betray the union; and
- the reputation of those who speak out about union wrongdoing become the subject of baseless slurs and vilification".²⁰

33. The statements above illustrate that the ability to compel a person to provide information is vital to protecting workers and other witnesses who want to speak up about the lawlessness that exists in their industry.

Powers are not unique

34. The Protecting Witnesses Bill extends the existing powers which are not new or novel either to the construction industry or generally. A range of other Commonwealth regulatory bodies have compulsory information gathering powers, such as the Australian Competition and Consumer Commission (ACCC), the Australian Prudential Regulation Authority, the Australian Securities and Investments Commission, the Australian Taxation Office, Centrelink and Medicare.

35. The effectiveness of such powers have been highlighted during the recent investigation by the ACCC of the alleged CFMEU boycott against Boral where the ACCC Chairman, Mr Rod Sims, was confronted by the culture of silence and fear of reprisal that is a feature of the building and construction industry.

¹⁷ Education and Employment Legislation Committee – Senate Estimates, 23 October 2014, page 104.

¹⁸ Statement by former ABC Commissioner and Director, Fair Work Building Industry Inspectorate, Mr Leigh Johns, 24 November 2010.

¹⁹ Interim Report – Royal Commission into Trade Union Governance and Corruption, Volume 1, paragraph 83, page 26.

²⁰ *Ibid.*, Volume 2, paragraphs 4 and 5, page 1008.

36. Mr Sims said that “the ACCC has only been able to progress the investigation by compelling people to give evidence”.²¹ Without the ACCC’s compulsory powers, the serious wrongdoing alleged would not have been put before the court.

37. Mr Sims also said that:

*Everyone involved can say they had...no alternative but to cooperate with our inquiry. So there’s been no voluntary walking through our doors. People have been required to do so on a compulsory basis. So I think that should give them all the comforts that they need. These people are in no way whistleblowers. When you get one of our compulsory notices they say it’s a criminal offence not to comply with them. I think everybody involved in this case who we will be calling as witnesses, who will be subpoenaed, can say they’re not here on a voluntary basis. They really have no alternative. I think that will be more than enough protection for them.*²²

Conclusion

38. The ability to compel a person to provide information is vital to protecting workers and witnesses who stand up to unlawfulness and intimidation and assist the regulator in its investigations. The powers also ensure the Fair Work Building Industry Inspectorate is able to carry out its investigations effectively and break down the ‘culture of silence’ and retribution that exists in the industry.

39. The *Fair Work (Building Industry) Act 2012* contains a number of protections around the examination notice process. These will continue to apply.

40. The Protecting Witnesses Bill extends powers which are not novel or new. As stated earlier, a range of other Commonwealth regulatory bodies have similar powers so that they can effectively investigate unlawful conduct.

41. The Government has stated it is committed to re-establishing the Australian Building and Construction Commission. The Protecting Witnesses Bill will ensure there is no gap in the ability of the building and construction industry regulator to effectively investigate contraventions of designated building laws until the Senate has had an opportunity to consider the legislation to re-establish the Australian Building and Construction Commission.

²¹ ACCC media release, 20 November 2014, ‘ACCC takes court action against the CFMEU alleging secondary boycott and undue harassment or coercion’.

²² ACCC press conference, 20 November 2014. As quoted in Workplace Express, 20 November 2014 – ‘No cartel conduct by Boral customers: ACCC’.