



NSW Council for Civil Liberties Inc.

Postal address: PO BOX A1386 SYDNEY SOUTH NSW 1235

Office address: suite 203, 105 Pitt Street SYDNEY NSW 2000

Phone: 02 8090 2952

Fax: 02 8580 4633

Email: office@nswccl.org.au

Website: www.nswccl.org.au



NSW COUNCIL FOR CIVIL LIBERTIES SUBMISSION: THE GOVERNMENT'S APPROACH TO RE-ESTABLISHING THE AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION

The New South Wales Council for Civil Liberties ("NSWCCL") welcomes the opportunity to submit to the Committee on "The Government's approach to re-establishing the Australian Building and Construction Commission through the Building and Construction Industry (Improving Productivity) Bill 2013 and related bills."

The NSWCCL was founded in 1963 and is one of Australia's leading human rights and civil liberties organisations. Its aim is to secure the equal rights of everyone (as long as they don't infringe the rights and freedoms of others) and oppose any abuse or excessive power by the State against its people. To this end NSWCCL attempts to influence public debate and government policy on a range of human rights issues. It seeks to secure amendments to laws, or changes in policy, where civil liberties and human rights are not fully respected. It listens to individual complaints and, through volunteer efforts, attempts to help members of the public with civil liberties problems. NSWCCL prepares submissions to government, conducts court cases defending infringements of civil liberties, engages regularly in public debates, produces publications, and conducts many other activities.

The NSWCCL is concerned about the re-establishment of the Australian Building and Construction Commission ("ABCC") in that it is a body with extreme powers, has a proven record of misuse of those powers in the past and would place Australia in breach of its international obligations. In particular the NSWCCL is concerned with the terms of reference *b, d, e, f, g, h* and given the short timeframe for submissions offers a succinct submission on these points. We would welcome the opportunity to elaborate at public hearing should the Committee desire.

b. the need or otherwise for a specialist industrial regulator in the building and construction industry;

The regulatory regime of the *Fair Work Commission* is already regulating unions, employer bodies and others across all industries and it is unnecessary and conflicting to have another body operating in the same space.

The proposed ABCC seeks to regulate industrial activity through the use of extreme coercive powers that are generally reserved for the most serious criminal matters but in this case would ultimately be used only for civil proceedings and trigger mainly civil penalties if a breach is found.

d. whether the bills are consistent with Australia's obligations under international law

It is the view of the NSWCCL that the proposed ABCC will be inconsistent with Australia's obligations under international law. If re-established the ABCC will have powers that may be used to interfere with rights under the International Covenant on Civil and Political Rights (the "ICCPR"). In particular we are concerned that the right to 'freedom of association' under Article 22 of the ICCPR, the right

to 'peaceful assembly' under Article 21 of the ICCPR, the 'right to silence' contained within Article 14 of the ICCPR would be adversely affected.

If there are specific serious allegations of wrong doing they should of course be investigated and if appropriate, prosecutions should proceed.

e. the potential impact of the bills on employees, employers, employer bodies, trade and labour councils, unions and union members

In its past iteration the ABCC appeared to focus its attention overwhelmingly upon the regulation of employees, union members, unions and officials. It is our view that this conduct amounted to a breach of the right to freedom of association under Article 22 of the ICCPR. Our concern is that a re-establishment of the ABCC would lead to discrimination against unions and their members.

f. the extreme and heavy-handed proposed powers of the Australian Building and Construction Commission, including coercive powers, conduct of compulsory interviews, and imprisonment for those who do not co-operate

The practical effect of the proposed ABCC is to be a specialist industrial regulator in civil jurisdiction with, almost exclusively, civil penalties available for punishment. It is extraordinary to provide such a body with coercive powers that force people to appear in front of the Commission, to answer questions and to cooperate under penalty of imprisonment. The proposed powers available to the ABCC are clearly unnecessary and disproportionate to its regulatory role.

These types of coercive powers are generally reserved for the most serious of criminal matters and reside with institutions such as the NSW Independent Commission against Corruption, the NSW Police Integrity Commission and have been allowed in the use of investigation of terrorism offences through the use of Questioning Warrants under the *Australian Security Intelligence Organisation Act 1979 (Cth)*. It is inconceivable that extreme powers that are normally reserved for matters as serious as the investigation of terrorism are required to provide civil regulation of the building and construction industry. In other jurisdictions compulsory questioning requires warrants and the production of documents require subpoenas that are issued by an independent Judge or Magistrate yet the proposed ABCC will be able to compel appearances and the production of documents of its own accord.

The ABCC has in the past demonstrated that it is incapable of managing these extreme powers appropriately. The prosecutions of *Noel Washington*, which was later dropped, and *Ark Tribe* where the ABCC was found to have unlawfully compelled Mr Tribe to appear at compulsory hearing then prosecuted him for failing to appear show that the ABCC cannot be trusted to exercise these sort of powers lawfully or in the public interest.

It is our view that existing criminal law and law enforcement bodies such as the police have adequate powers to investigate and prosecute any criminal activity, whether in the building and construction industry or elsewhere and therefore it is not only unnecessary to provide for an ABCC with coercive powers but may well provide the environment for these extreme powers to be misused.

It would be a grave mistake to provide such extreme powers to the ABCC without providing independent oversight and checks and balances over its use.

g. the provisions of the bills relating to requirements to provide information to the Australian Building and Construction Commission during interviews including provisions that interviewees have no right to silence

The right to silence is provided for under Article 14 of the ICCPR. It is a fundamental right against forced self-incrimination in our justice system. In the rare examples where the right to silence is removed then generally it is coupled with protection against prosecution in return. The proposed ABCC would be able to compel a witness to appear and force them to answer questions under penalty of imprisonment yet there is no accompanying protection against penalty if their own evidence ultimately leads to their conviction of an offence.

h. the provisions of the bills that introduce the law of conspiracy into the industrial regulation of the building and construction industry

Existing criminal law is more than capable of providing regulation of and for the investigation and prosecution of any criminal activity whether in the building and construction industry or any other in Australia. It is unnecessary and unwelcome to introduce conspiracy laws into industrial regulation as it blurs the boundary between civil and criminal jurisdictions.

Conclusion

The proposed reintroduction of the ABCC would unnecessarily create a narrow specialist body to regulate industrial activity within a civil jurisdiction. In doing so it would be provided with extreme powers to compel workers to produce documents, attend hearings and answer questions under penalty of imprisonment. In essence, it would have disproportionate powers to its function in that it would exercise powers that are usually reserved for the most serious of criminal matters but would be applying them to regulation of workplaces. There is already a body in the *Fair Work Commission* that is able to regulate the building and construction industry and is appropriately resourced and has appropriate powers to do so. If there is any evidence of criminal activity that warrants additional investigation of the building and construction industry then it is our view that that is best achieved through existing criminal law by the Police and not through the re-creation of the ABCC.

NSWCCL is willing to elaborate on this submission directly to the Commission if it has public hearings.

This submission was prepared on behalf of NSWCCL by Cameron Murphy, previously president and currently a CCL committee member.

Yours sincerely

Dr Lesley Lynch
Secretary
NSW Council for Civil Liberties
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Contact in relation to this submission: Cameron Murphy: cmurphy@bigpond.com; mobile 0411769769