



ASU Submission
To
Education and Employment Legislation Committee
Senate Inquiry
Parliament of Australia

**Re: Building and Construction Industry (Improving Productivity) Bill 2013 [No.2]
and the Building and Construction Industry (Consequential and Transitional
Provisions) Bill 2013 [No.2]**

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Introduction

The Australian Services Union (ASU) welcomes the opportunity to participate in the current Inquiry.

The Union and its various Branches are right to express concern regarding the reconsideration of the ABCC legislation.

The ASU is a Union which supports free and democratic trade union structures. It values the Australian democratic framework in which the Union operates, including the separation of powers of the Parliament, the Executive and the Judiciary.

The Union supports effective, fair anti-corruption measures. However, the Union has significant concerns about special laws and a special inspectorate for the building and construction industry which may work unfairly against workers and effectively amounts to an expensive witch-hunt.

The Government's apparent focus on the removal of workers' rights is of great concern. Whilst it is important to deal with corrupt behaviour (including that which is conducted by employers and other players within the building industry) we are of the view that all workers deserve the right to a fair go.

In addition, there are already alternative ways to deal with issues of corruption and illegal activities without recourse to the need for wasteful expenditure and the diverting of expertise toward the re-establishment of ABCC.

In our submission we will also raise some concerns in relation to particular areas where our members are employed.

About the ASU

The Australian Services Union (ASU) is one of Australian's largest unions, representing approximately 120,000 members.

The ASU was created in 1993. It brought together three large unions – the Federated Clerks Union, the Municipal Officers Association and the Municipal Employees Union, as well as a number of smaller organisations representing social welfare workers, information technology workers and transport employees.

Today, the ASU's members work in a wide variety of industries and occupations and especially in the following industries and occupations:

- Local government (both blue and white collar employment)
- Social and community services
- Transport, including passenger air and rail transport, road, rail and air freight transport
- Clerical and administrative employees in commerce and industry generally
- Call centres
- Electricity generation, transmission and distribution
- Water industry
- Higher education (Queensland and SA)

The ASU has members in every State and Territory of Australia, as well as in most regional centres.

The ASU has nine branches. These include the NSW United Services Branch, Queensland (Services and Northern Administrative) Branch, Queensland Together Branch, NSW and ACT (Services) Branch, Taxation Officers' Branch, Victorian and Tasmanian Authorities and Services Branch, as well as the Victorian Private Sector Branch.

The legislation is unjust and wrong

The ASU is opposed to coercive powers that impinge upon the civil liberties and rights of workers.

Workers in the building and construction industry should be subject to the same laws as apply to other workers in relation to possible corrupt activity and should not be targeted through this type of legislation. The Union is of the view that there should be consistency with the fundamental principle of equality of all persons before the law.

There are already established laws and institutions to deal with criminal behaviour. To subject any group of workers or industry to special more punitive laws is unnecessary and discriminatory.

The Union considers it a waste of resources to have such structures and activities set up to unfairly target this industry, their workers and their Unions. It appears to reflect a very divisive strategy at work by a Government that appears to have a cavalier approach to concepts of fairness and equity. Unfortunately such an approach can have destructive and dangerous implications for future generations of Australians and raise concerns about other sections of society and other workers who may become future targets of discriminatory legislation.

We note that strong arguments have already been made in opposing to the legislation, based on Australian's commitments to human rights obligations, including those of the International Labour Organisation (ILO), an arm of the United Nations.

There are other alternatives.

The Australian society has a great deal of other alternatives means of dealing with corruption, poor behaviour and violence.

Indeed, we see regular reporting in the media of actions taken by State independent anti-corruption bodies and authorities. When adequately resourced and empowered, such authorities are capable of acting fairly in showing no favour or bias against particular sections of society. Indeed, they will prosecute persons whether they be senior barristers, lawyers, union officials, businesspeople, or government officials - whether or not people are in very senior position or much lower positions in the workforce.

In New South Wales, the Independent Commission Against Corruption (ICAC) provides an example of tenacious efforts to get to the heart of corrupt activities. Similarly, the work done by equivalent organisations in other states provide an indication of some existing structures in place which scrutinise corrupt activities without exclusively targeting one strata of society – their procedures will include people from the wealthy, influential circles to those who are not in the most advantageous of situations.

There are, fine policing institutions dealing with a range of situations. For example, at the national level the Australian Federal Police, from time to time investigate matters surrounding the Australian Parliament, provide security for such as well as policing our society in relation to various forms of criminal activity, national security and other issues. Indeed, citizens may report criminal activity to either their State Police and/or Federal Police.

There are of course, many institutions which have dealt with issues of corruption (such as the Australian Crime Commission, Pecuniary Interest and Disciplinary Tribunals (PIDT), the State Ombudsman, Federal and State Police, ICAC, Federal and State Courts along with other institutions). Those which are empowered to prosecute offenders will do so based on the circumstances, evidence and the powers available to them.

Indeed, we have seen a number of inquiries, investigations and court procedures over the years that have subsequently resulted in prosecutions further down the track.

Support for ACTU submission

The ASU takes this opportunity to express our support for the submission of the ACTU and other unions' in opposing the legislation.

The ASU, as a member of the Australian Council of Trade Unions, works closely with a range of other unions in seeking the betterment of an improved society, improved safety legislation and, in a more general sense, strives for a more equitable society. Indeed, the rules of our union and the philosophy behind the union movement is one aimed at providing a more equitable share of wealth by advocating for our members as well as supporting the efforts of other unions and various social justice issues raised

by civil society. Together we aim to achieve broad goals within a social and economic agenda as well as attending to workplace issues such as safety issues and other concerns.

Indeed, we would suggest that, should there be a reduction in issues of workplace safety in the construction industry, we would hold great concerns that lesser standards would ultimately find their way within other industries.

Safety is a primary area of concern and any legislation that encourages or discourages workers from being able to put forward their views in this manner is indeed dangerous and should be discouraged. We believe that such policing issues undertaken by a separate body known as the ABCC would give the wrong signal to our society and would encourage a reduction in safety standards across many industries, as well as undermining human rights commitments.

Lack of a common-sense in the legislative approach.

The ASU is of the view that certain pieces of the legislation lack a common sense approach and invite absurd applications to broader areas of activity.

At this point the Union seeks to draw the Senate Committees attention to particular definitions relating to the nature of the building industry and what constitutes a building/construction area of a business.

We refer to the *Building and Construction Industry (Improving Productivity) Bill 2013*, Section 6 Meaning of *building work*. The ASU notes that the definition of building work is very broad. Its meaning under the legislation is important to the understanding and application of the Bill.

As already indicated, a large proportion of ASU members are employed in publicly owned and operated water industries either by State owned corporations or local government entities, local government direct employees as well as employees in the electricity distribution generation and transmission industries who provide not only construction activities in these three areas for their principal employers but also provide additional works for private sector and/or other business enterprises including the Federal government by way of contestable works or expressions of work as provided as a last resort.

As such, they already operate within a strong regulatory framework. Some of these workers are directly involved in building and construction, such as the building and construction of utilities, roads, bridges, amenities and various building works. We are concerned about the unfairness of the legislation, and that the targeting of workers could be expanded further and further so as to undermine the framework in which other industries and workers operate. This could not only undermine the application of human rights obligations but also result in unnecessary wastage, duplication and place onerous burdens on the workers directly employed by councils and other entities.

Previous legislation of the Howard era sought to define the local government industry as being subject to consideration and involvement by the ABCC legislation. This was undertaken in matters such as the above style authorities picking up undertaking contracts provided by the Federal Government and/or working with a third party private sector contractor in the provision of these services to the Federal Government.

- Local Government Example

Indeed, we understand that a council in NSW was advised that its business needed to become ABCC compliant for it to assist and work with a third party capital infrastructure company that was constructing a major portion of highway under a Federal Government project. The individual council was required or requested, both by way of practicality and expense, to assist with the local community and working with the contractor building this highway to provide the construction of concrete bollards for traffic control. Upon enquiries, the council was apparently told that, to participate in such a project and thereby assist the local community, it would need to have an ABCC compliant agreement that it could use for its workforce.

The difficulty is not just present in the fact of the legislation targeting a group of workers (in this case local government employees) but also the activities those employees undertake. The employees providing assistance in this area would include building/construction style workers as well as general council workers, truck drivers and others who would assist in manufacturing the concrete bollards and shipping them to their location on the highway for use. This, however, meant that the council workers involved in these processes would undertake other duties for the council such as general driving of motor vehicles, ground maintenance, a range of other activities that would be their normal way of work. Hence they would be working within either an ABCC compliant arrangement and/or separate from.

However, the legislative compliance and activities required by the particular department, as per the ABCC legislation, would require the concept of involvement of “whole of business”.

Thus, a council providing such a service to a third party entity and/or directly to the Federal Government (in the form of assistance for roadway construction and related services, everything from stop and go men through to council used graders, items of plant and such, not to mention minor construction work at councils such as a toilet block or other small works, eg kerb and guttering) would have to have the whole of their business ABCC compliant.

This would in turn mean that the council’s business (which includes libraries, art galleries, community services, childcare facilities, town planners, sport and recreation officers, beach inspectors and many other service areas) would need to have their employment arrangements altered to provide an ABCC compliant instrument.

The ASU would have grave concerns about young or vulnerable workers being dragged out and summoned to appear before ABCC enquiries and closed hearings and not able to share this experience with their parents. This experience could be very intimidating for a young person and grossly unfair.

As local government workers are employed in a range of positions, including libraries, childcare facilities and other community services areas, it does not seem appropriate or sensible for them to be subject to intimidating ABCC investigations and closed hearings.

- Energy Generation Example

The ASU also has seen similar actions take place in the refit of a power station in Victoria where the company undertaking the construction was advised they would need to have an ABCC compliant agreement for the whole of the site. Because of the way in which the work is executed, the site was the perimeter fencing of the establishment. That included not just the exterior fencing but also the power generation units, the boilers of the power station, and all other factors at that power station including clerical, administrative, payroll, safety, engineering staff and general cleansing and maintenance teams that would have been subject to the ABCC compliant requirements.

The ASU was presented with legal advice from the specific energy company to the effect that they would be included in the legislation and we chose to argue the point out with the company in the most delicate manner. The company did eventually drop its action after many weeks or months of pursuing the arrangement to ensure that the whole of the site was the construction fence.

The Union is likely to table information relating to the above examples in order to support and substantiate our concerns, when the opportunity arises in the course of public hearings.

Some of the faults with this legislation, and indeed any other sorts of legislation that seek to corral and place collars around specific sectors and/or workers, can be evident within the definitions- it can be hard to be precise about the reach of the legislation with regard to particular workplace locations, concepts of 'whole of business' and specific 'building/construction sites'.

The examples from local government and energy generation, indicate a definite weaknesses of the legislation when examining specific areas associated with the application to 'whole of business' areas and the parameters or reach of a 'building/construction site'.

The Union is also of the view that any additional requirements placed on local or state governments as a result of this legislation will result in further cost shifting to these governments at a time when they are experiencing severe cuts to funding. The wasteful diversion of resources to this fatuous exercise is an indication of disrespect for the communities who have been denied access to funds for essential services that they have come to rely on.

Issue of 'constitutional corporations'.

In addition to the above considerations, there are others which may affect the reach of the legislation. So for instance, if the legislation is applicable only to constitutional corporations (as defined in s51(xx) of the Australian Constitution) then we would suggest that there are various complications if attempts are made to apply the legislation to the local government sphere.

Indeed the current situation would suggest that local government and public sector areas (such as electricity generation, transmission and distribution as well as the water supply areas) would not clearly or easily fit within the reach of the legislation if it is limited to entities considered to be constitutional corporations.

We note the Decision of Justice Spender in the matter of the Australian Workers Union of Employees, Queensland v Etheridge Shire Council (2008) FCA 1268, which concluded that Etheridge Shire Council (in Queensland) was not a constitutional corporation.

In NSW, specific legislation declared that local and county councils have the status of “bodies politic of the State’. *The Local Government Amendment (Legal Status) Bill 2008* obtained assent on 20 November 2008, amending the *Local Government Act 1993*. The result being that:

Local and county councils will not be constitutional corporations for the purposes of laws of the Commonwealth.¹

Similar legislation to that in NSW was enacted in Queensland. However there are councils in some states (Tasmania and Victoria) which are considered to be constitutional corporations as defined under section 51 (xx) of the Constitution. But diverse arrangements are in place in some other states where some councils (within the same State) have been considered to be constitutional corporations while others are not (we refer here to the situation in South Australia and Western Australia).

As already noted, it is not clear from the current Bills relating to the building industry, precisely how far its application could legitimately extend. We would submit that it would not be appropriate to have local government bound by the legislation.

Complexity of the legislation

We emphasise that the Union has considerable concern with respect to council activities being captured by the legislation (such as the laying a kerb and guttering or street pavement or a council placing new goalposts in at the local soccer field and/or ruby league fields, a beach inspector even placing a flagpole in the ground, a council directly employed builder, laying foundation stones and/or rows of bricks and/or a carpenter nailing up a small shed). In some respects it is absurd that these activities could potentially being defined as a building/construction activity – as construction affixed to the ground.

The legislation lacks precision and can potentially apply to a range of activities, such as those resulting from general road construction grants and other Federal Assistance Government grants provided to local government for various activities (including small sites where the local council toilet block is being built on the council oval) but other facilities and activities throughout the whole council’s operation are consequently also captured within the orbit of the legislation (including social and community services, home care, childcare, beach inspectors and a range of other activities including cattle sales yard managers, abattoir staff, council rangers and many, many other occupations in local government.) Indeed, there are over 104 key classifications of workers in local government and up to 450 individual classifications of workers in local government across Australia. To be able to define and exempt any of these classifications, or local government generally seems to be a a complex activity and may not, in the longer term, withstand challenges relating to arguments of constitutional consistency.

¹ Australian Legal Information Institute, Local Government Amendment (Legal Status) Bill 2008, Explanatory notes, p2, http://www.austlii.edu.au/au/legis/nsw/bill_en/lgasb2008398/lgasb2008398.html

Call to reject the legislation

Considering the above issues raised by the Union, we urge the Senate Committee to recommend the rejection of the legislation.

The legislation appears to be technically flawed, its reach appears difficult to contain, there are difficulties presented as a result of the broad definitions provided in the legislation and questions have been raised about the appropriateness of its application to particular individuals, local government and various other government authorities.

We would urge the committee to establish other mechanisms and/or to research other compliance regimes that already exist in Australia and may be more appropriately proposed as alternatives to be put to the Government.

We believe this alternative approach would preserve the strongest democratic frameworks of our society and ensure that legislation (such as the current legislation relating to the ABCC) would not be misused either intentionally or otherwise at some time in the future.

In short, the legislation is not an appropriate path going forward for our democracy and the Union remains concerned about possible abuse of coercive powers into the future.

Once again, the ASU wishes to thank the Senate Committee for the opportunity to make this written submission. We also advise that Mr Greg McLean OAM would be available to support the submission by appearing before a public hearing if invited to do so.