



Re-establishment of the Australian Building and Construction Commission

Senate Education and Economics Legislation Committee

19 February 2016

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

Table of Contents

Acknowledgment	2
Executive Summary	3
Introduction	4
Proposed legislation	4
Inappropriate delegations of legislative power	5
Insufficiently defined and overly broad discretionary powers	6
Coercive powers	7
Entry onto premises without consent or warrant	8
Self-incrimination	9
Reversal of the onus of proof	11
Reasonable excuse	12
Retrospectivity	12
Penalties	13
Exclusion of judicial review	14
Merits Review – provision of reasons	14
Incompatibility with human rights	15
Attachment A: Profile of the Law Council of Australia	17

Acknowledgment

The Law Council acknowledges the assistance of its National Criminal Law Committee and the Business Law Section's Privacy Law Committee in the preparation of this submission.

Executive Summary

1. The Law Council is grateful for the opportunity to provide this brief submission in response to the Senate Education and Employment References Committee's (the Committee) inquiry into the re-establishment of the Australian Building and Construction Commission (ABCC) through the Building and Construction Industry (Improving Productivity) Bill 2013 [No. 2] (the Bill) and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 (the Transitional Bill).
2. The purpose of the Bill and Transitional Bill is to re-institute a separate workplace relations framework for the building industry based largely on the *Building and Construction Industry Improvement Act 2005* (Cth) (the BCII Act). The Bill would re-establish the ABCC and invest the Australian Building and Construction Commissioner (ABC Commissioner) with coercive questioning powers, introduce a new civil penalty offence of unlawful picketing, reintroduce provisions dealing with unlawful industrial action, coercion and the associated civil penalties specific to the building industry, and broaden the scope of these provisions. It would provide for penalties for building industry participants which are considerably higher than those available under the existing *Fair Work Act 2009* (Cth) (Fair Work Act).
3. The Bill has been reintroduced into the Parliament to address specific issues relating to allegations of corruption and behaviour within the building and construction industry.
4. A number of features of the Bill are contrary to rule of law principles and traditional common law rights and privileges such as those relating to the burden of proof, the privilege against self incrimination, the right to silence, freedom from retrospective laws and the delegation of law making power to the executive. It is also unclear as to whether aspects of the Bill which infringe upon rights and freedoms are a necessary and proportionate response to allegations of corruption and illegal activity within the building and construction industry.
5. For these reasons, the Law Council's primary recommendation is that the Bill not be passed in its current form.
6. If it is to be enacted, the Law Council's submission makes a number of recommendations as to how the Bill may be strengthened to align with rule of law principles and traditional common law rights and privileges.

Introduction

7. The Bill appears to have been reintroduced by the Government, following its initial introduction in 2013, in response to concerns about corrupt conduct in the building industry arising from the *Royal Commission into Trade Union and Corruption Report* (December 2015).
8. The introduction of the Bill follows a detailed history of legislative and judicial developments. As the Committee would be aware, the Bill has previously been subject to its consideration¹ and also to scrutiny by the Senate Standing Committee for the Scrutiny of Bills (SSCSB)² and the Parliamentary Joint Committee on Human Rights (PJCHR).³
9. Prior to the introduction of the ABCC 2013 Bill, the establishment and subsequent removal of the ABCC was also subject to inquiry by a range of public and parliamentary bodies including, a public inquiry in 2007 conducted by Murray Wilcox and a Royal Commission in 2001 led by Terrence Cole.
10. The Government is to be commended on its desire to eliminate corruption in the building and construction industry. Corruption is a major obstacle to democracy and the rule of law.⁴ It can also have significant economic, social and environmental consequences.⁵
11. However, this submission focuses on inconsistencies with the rule of law in the proposed ABCC legislation, which suggest that it should not be enacted in its current form.

Proposed legislation

12. In its December 2013 Report on the ABCC legislation introduced in 2013 (which appears to be no different to the current legislation before the Committee), the Committee recommended that the Senate pass the Bill without amendment. This assessment was made noting that the bills had not yet been considered by the PJCHR or the SSCSB.⁶
13. In light of key difficulties with the Bill being identified by various organisations, including the Law Council, the SSCSB and the PJCHR, a re-examination of that recommendation is warranted. These difficulties should be remedied prior to any enactment of the ABCC legislation.

¹ Senate Standing Senate Standing Committees on Education and Employment, Parliament of Australia, *Report into the Building and Construction Industry (Improving Productivity) Bill 2013 and Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013* (2013) [1.26].

² Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest No. 9 of 2013*, 11 December 2013.

³ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 Bills introduced 30 September-2 October 2014 Fourteenth Report of the 44th Parliament* (2014) 106-113.

⁴ Transparency International: the global coalition against corruption (2015) <<http://www.transparency.org/what-is-corruption/#costs-of-corruption>>

⁵ Ibid.

⁶ Senate Education and Employment Legislation Committee, Parliament of Australia, *Building and Construction Industry (Improving Productivity) Bill 2013 [Provisions], Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [Provisions] Report* (2013) 5 .

Recommendation:

- **The Bill and Transitional Bill should not be enacted in their current form. If they are to be enacted, they should be amended according to the recommendations outlined in this submission.**

Inappropriate delegations of legislative power

14. The Bill contains a range of delegations of legislative power, which the SSCSB has previously identified as raising concern.⁷ Provisions that enable the determination of important matters by regulation are an inappropriate delegation of legislative power and are inconsistent with the rule of law.
15. The Law Council urges the Committee to await the SSCSB's findings on the Bill to address the appropriateness of these matters being dealt with in delegated legislation rather than the primary legislation. Where the SSCSB suggests an inappropriate delegation of legislative power, the ABCC legislation should be amended accordingly.
16. Clause 120 of the Bill allows the Minister to make rules by legislative instrument. The following provisions may involve an inappropriate delegation of legislative power:
 - Clause 5 of the Bill includes a definition of 'authorised applicant', which is a person who is entitled to seek an order relating to a contravention of a civil remedy provision. The definition allows the rules to determine that someone is an authorised applicant, and the SSCSB comments that it is not clear why this should be left to regulation – or indeed why persons other than the ABC Commissioner or persons affected would need to be authorised.⁸
 - Clause 6 of the Bill includes a definition of 'building work' which the Explanatory Memorandum describes as 'integral', as it determines the scope of the Bill's application.⁹ Nonetheless, subclause 6(4) would allow rules to be made to include additional activities within the definition of building work.
 - Subclause 11(2) allows the rules to extend the application of the Bill in relation to the exclusive economic zone and waters above the continental shelf. The Explanatory Memorandum does not address why this is necessary or proportionate.
 - Paragraph 19(1)(d) provides the ABC Commissioner with a broad power of delegation to 'a person... prescribed by the rules' (paragraph 19(1)(d)). It is unclear why such a broad delegation of power is necessary and proportionate given that paragraphs 19(1)(a)-(c) already allow for delegations to a Deputy ABC Commissioner, an inspector and an SES employee or acting SES employee. The Federal Safety Commissioner has a similar power under paragraph 40(1)(c).

⁷ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest No. 9 of 2013*, 11 December 2013.

⁸ *Ibid.*, 4.

⁹ Explanatory Memorandum, Building And Construction Industry (Improving Productivity) Bill 2013 [No. 2] (Cth) 5.

- Clause 43 provides that a Work Health and Safety Accreditation Scheme may be established under the rules. A concern arises that too little detail is set out in the Bill, and the Explanatory Memorandum does not explain why it is appropriate for the Scheme to be established in this way.
- Paragraph 70(1)(c) provides that the purposes for which an inspector may exercise compliance powers include ‘purposes of a provision of the rules that confer functions or powers on inspectors.’ The effect of this provision is that the coercive powers could be used in a range of circumstances not contemplated by the Parliament. The scope of application of the coercive powers should be specified within the primary legislation. Coercive powers are extraordinary powers and should be limited to where they are warranted in the public interest.¹⁰ The scope of their application in legislation is therefore of a kind which ought to be firstly determined by Parliament alone with subsequent appropriate oversight.

Recommendations:

- **The Committee to await the SSCSB’s findings on the Bill to address the appropriateness of these matters being dealt with in delegated legislation rather the primary legislation. Where the SSCSB suggests an inappropriate delegation of legislative power, the ABCC legislation should be amended accordingly.**
- **The scope of application of the coercive powers should be specified within the primary legislation.**

Insufficiently defined and overly broad discretionary powers

17. The Bill contains insufficiently defined and overly broad discretionary powers, which would accord more readily with the rule of law if further detail were provided in the legislation.
18. For example, subclause 21(3) would empower the Minister to appoint a person as a Commissioner on the basis that s/he is satisfied that the person (a) has suitable qualifications or experience and (b) is of good character. The SSCSB has noted that ‘it may be desirable to indicate with more detail the nature of suitable qualifications or experience’.¹¹
19. The Law Council agrees with this assessment.

Recommendation:

- **Subclause 21(3) or the Explanatory Memorandum should indicate in more detail the nature of suitable qualifications or experience for a Commissioner.**

¹⁰ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest No. 9 of 2013*, 11 December 2013, 12.

¹¹ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourth Report of 2014* (2014) 104.

Coercive powers

20. Chapter 7 Part 2 of the Bill would invest the ABC Commissioner (or his or her delegate) with coercive powers, including powers to require a person to: give information or produce documents to the ABC Commissioner; attend an examination before the ABC Commissioner and answer questions or provide information under oath or affirmation. These powers can be exercised when the ABC Commissioner reasonably believes that the person has information or documents relevant to an investigation by an inspector into a suspected contravention, by a building industry participant, of the Bill or a designated building law; or is capable of giving evidence that is relevant to such an investigation.¹²
21. In addition, coercive questioning powers can be exercised by an ABC Commissioner or his or her delegate if s/he reasonably believes that the person is capable of giving evidence that is relevant to an investigation into a breach of a law delegated by regulation.¹³
22. It is an offence to fail to comply with requirements imposed by an examination notice to produce documents or information, or attend to answer questions.¹⁴ It is also an offence to fail to take an oath or affirmation when required to do so¹⁵, or to refuse to answer questions relevant to the investigation when being examined¹⁶. The penalty for these offences is a maximum of 6 months imprisonment.
23. While the right for an examinee to be represented by a lawyer is provided for in subclause 61(4), it is also important to recognise that the ABC Commissioner and delegates have an implied power to exclude a particular legal practitioner from an examination if they conclude, on reasonable grounds, and in good faith, that the representative either will, or may, prejudice the investigation.¹⁷
24. Unlike the existing *Fair Work (Building Industry) Act 2012* (Cth), the Bill does not require the ABC Commissioner to apply to the Administrative Appeals Tribunal (AAT) for an examination notice. This means that there is an absence of independent oversight in the process of authorising the use of the extraordinary coercive information gathering powers *prior* to their exercise. The absence of such oversight may result in the unjustified exercise of such powers.
25. While an oversight role for the Commonwealth Ombudsman is provided in the Bill, for example that requires copies for the examination notice to be provided to the Ombudsman and reports to be provided by the Ombudsman to Parliament, the former Ombudsman submitted that this legislation would expand his office's role if the Bill was passed.¹⁸
26. For example, the Ombudsman notes that in light of the lower threshold for authorising the use of such powers and the removal of the requirement to have examination notices approved by the AAT, the Ombudsman would expect to see records relating to

¹² Building And Construction Industry (Improving Productivity) Bill 2013 [No. 2] (Cth), cl 61(1).

¹³ *Ibid.*

¹⁴ Building And Construction Industry (Improving Productivity) Bill 2013 [No. 2] (Cth), cl 62(b)(i) – (ii).

¹⁵ *Ibid.*, cl 62(b)(iii).

¹⁶ *Ibid.*, cl 62(b)(iv).

¹⁷ *Bonan v Hadgkiss (Deputy Australian Building and Construction Commissioner)* [2006] FCA 1334.

¹⁸ Mr Colin Neave, Commonwealth Ombudsman, Submission to the Senate Standing Committees on Education and Employment, *Inquiry into the provisions of the Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013*, November 2013, 4.

the Commissioner's decision to issue notices to ensure that there was reasonable belief that the person has documents or information relevant to an investigation or is capable of giving evidence that is relevant to an investigation.¹⁹ Nonetheless, this oversight role would only allow the exercise of the powers to be assessed *after* they have been exercised, where the liberties of individual may have already been negatively impacted.

Recommendation:

- **Independent oversight by the AAT or a court should be required before the exercise of coercive powers under the Bill.**

Entry onto premises without consent or warrant

27. The Bill also authorises the appointment of Australian Building and Construction Inspectors and Federal Safety Officers (FSOs), (who together are called authorised officers) and invests them with powers to enter premises, ask a person's name and address, and require persons to produce records or documents if s/he reasonably believes that the Act, a designated building law or the Building Code is being breached.
28. The power to enter premises under clause 72 is without consent or warrant. The powers also authorise entry into residential premises.²⁰
29. Entry to premises without consent or warrant may be reasonable in situations of emergency, serious danger to public health, or where there is a serious threat to national security.²¹ However, it is not clear how the circumstances involving the checking of compliance meets these criteria. In the absence of evidence otherwise, the power to enter premises should require consent or a judicial warrant.
30. The Law Council's *Rule of Law Principles* provide that the use of executive powers should be subject to meaningful parliamentary and judicial oversight particularly, powers to, for example, enter private premises, to copy or seize information, or to compel the attendance or cooperation of a person.²² For this reason, if an entry onto premises power is demonstrated to be necessary, it should require adequate oversight and reporting requirements.
31. While these extraordinary powers do not permit the use of force, they are nonetheless coercive in nature and are generally reserved for law enforcement and intelligence agencies that have strict oversight and reporting requirements and are subject to legislative regimes that include certain safeguards relating to the use of such powers.
32. These coercive powers are proposed to be granted to persons who are not trained law enforcement officers. It is not clear as to whether it is proposed that they have similar levels of training when exercising coercive powers. Nor does there appear to

¹⁹ Ibid, 3.

²⁰ Building And Construction Industry (Improving Productivity) Bill 2013 [No. 2] (Cth), cl 72(3).

²¹ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Entry and Search Provisions in Commonwealth Legislation* (2000) 75 [1.44].

²² Law Council of Australia, *Policy Statement: Rule of Law Principles*, (March 2011) 4.

<<https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/PolicyStatementRuleofLaw.pdf>>

be adequate senior authorisation or reporting requirements. These concerns have also been identified by the SSCSB²³.

Recommendations:

- **The power of inspectors and FSAs to enter premises should require consent or a judicial warrant. If this is not accepted by the Committee, the powers to enter premises should at a minimum require senior executive authorisation for the exercise of the powers, reporting requirements, and requirements that guidelines for the implementation of these powers be developed to ensure an adequate level of training is given to persons who exercise the powers.**

Self-incrimination

33. The common law privilege against self-incrimination and against penalty is a substantive right of long standing, applicable to criminal and civil penalties and forfeiture. It is deeply ingrained in the common law and is not to be taken to be abrogated by statute except in the clearest terms.²⁴ Its protection is required by the *International Covenant on Civil and Political Rights*²⁵ and is protected under Australia's legislative framework.²⁶
34. Clause 102(1) of the Bill abrogates the common law privilege against self-incrimination²⁷ where information is required under an examination notice (clause 61); when an authorised officer enters premises (clause 74(1)(d)); or pursuant to a notice (clause 77(1)). Use/derivative-use immunity is provided in relation to information, records, documents and answers given pursuant to an examination notice (with some limited exceptions²⁸). However, the same information is only given use/derivative use immunity in relation to *criminal* proceedings if the information is obtained:
- as a result of an authorised officer entering a premises under clause 74 and requiring a person who has custody of, or access to, a record or document to produce the record or document (74(1)(d)); or
 - as a result of an authorised officer requiring a person, by notice, to produce a record or document to the authorised officer (77(1)).

²³ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourth Report of 2014* (2014) 117.

²⁴ *Smith v Read* (1736) 1 Atk 526 at 527; [26 ER 332], *R v Associated Northern Collieries* (1910) 11 CLR 738 at 742, 744; *Sorby v Commonwealth* (1983) 152 CLR 281, at 309–310 and 316; *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543 at 554; *Rich v ASIC* (2004) 220 CLR 129 at 141 - 143

²⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(3)(g).

²⁶ *Evidence Act 1995* (Cth), 1995 (NSW), 2001 (Tas), 2008 (Vic), 2011 (ACT), *Evidence (National Uniform Legislation) Act* (NT), ss128, 128A; *Human Rights Act 2004* (ACT), s22(2)(i); *Charter of Human Rights and Responsibilities Act 2006* (Vic), s25(2)(k). See also *Australian Securities and Investments Commission Act 2001* (Cth), s68; *Banking Act 1959* (Cth), s52F; *Competition and Consumer Act 2010* (Cth), ss155(7), 155B, 159; *Corporations Act 2001* (Cth), ss597(12) and (12A), *Work Health and Safety Act 2011* (Cth), s172; *Royal Commissions Act 1903* (Cth), ss6A (3), (4).

²⁷ *Sorby v The Commonwealth* (1983) 152 CLR 281. See also *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328.

²⁸ Such as indemnity in relation to proceedings for offences for providing false information and the obstruction of Commonwealth officials under the Criminal Code.

35. The lack of use/derivative-use immunity for civil proceedings means that evidence or information subsequently gathered as a result of evidence or information obtained under clauses 74(1)(d) and 77(1) may be used against the person in civil proceedings.
36. The principles that apply to a consideration of whether a law that excludes the privilege against self-incrimination is justified²⁹ generally require an assessment that the public benefit which will derive from negation of the privilege must decisively outweigh the resultant harm to the maintenance of civil rights.³⁰
37. The Explanatory Memorandum to the Bill notes that the abrogation of the privilege was 'considered necessary by the Royal Commission³¹ on the grounds that the ABCC would otherwise not be able to adequately perform its functions due to the closed culture of the industry'³². In response to this, the SSCSB noted that the report relied upon to justify the necessity of the approach based on factual claims about the 'closed nature of the industry' was written in 2003,³³ now more than 10 years ago.
38. The Law Council considers that the guiding principle for legislators should be that privilege is not to be abrogated except³⁴:
- in circumstances where there is a real and foreseeable risk to public health and safety;
 - by clear, express statutory provisions;
 - where both use and derivative-use immunity are provided; and
 - where it is restored when the immediate danger, the subject of the investigation or enforcement activity which triggered the abrogation, has been averted or downgraded.

Recommendations:

- The use/derivative use immunity applicable in clause 102(3) be expanded to include civil proceedings.**
- A fuller explanation be provided in the Explanatory Memorandum of the importance of the public interest and why the abrogation of the privilege is considered absolutely necessary.**³⁵

²⁹ Subsections 128(1) and (4) of the Uniform Evidence Acts allows a witness to object to giving particular evidence that 'may tend to prove' that they may have committed an offence or are liable to a civil penalty (subject to the court's discretion to allow the evidence). Further, international law principles, including Article 14(3)(g) of the ICCPR provide that the accused in criminal proceedings shall be entitled to the right 'not to be compelled to testify against himself or herself, or to confess guilt'.

³⁰ *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 503 (Mason CJ and Toohey J). See also, *Sorby v The Commonwealth* (1983) 152 CLR 281, 298 (Gibbs CJ) and Senate Standing Committee for the Scrutiny of Bills, *The Work of the Committee during the 39th Parliament November 1998-October (2001) 27-28*.

³¹ Commonwealth, Royal Commission into the Building and Construction Industry (2003).

³² Explanatory Memorandum, Building And Construction Industry (Improving Productivity) Bill 2013 [No. 2] (Cth), 56.

³³ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourth Report of 2014* (2014) 123.

³⁴ Law Council of Australia, Submission to the Australian Law Reform Commission, *Interim Report into Traditional Rights and Freedoms – Encroachment by Commonwealth Laws*, (9 October 2015) 38.

³⁵ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourth Report of 2014* (2014) 123.

Reversal of the onus of proof

39. There are several instances of reverse onus of proof where a legal burden would be placed on an employee. The rule of law requires that the defendant should only bear the onus of establishing a matter where that matter is particularly within the defendant's knowledge and not available to the State or the prosecution.³⁶ Even then the defendant should ordinarily bear an evidential, as opposed to a legal burden.³⁷
40. The Bill would prohibit certain unlawful industrial action.³⁸ Under clause 7, action taken by an employee based on health and safety concerns may not be regarded as 'industrial action', but a legal burden of proof is on the employee to prove that the action was based on the employee's reasonable concern about an imminent risk to his or her health and safety and that s/he did not unreasonably fail to perform other available work.³⁹ An equivalent provision in the Fair Work Act which excludes certain action taken for health and safety reasons from the definition of 'industrial action' (paragraph 19(2)(c) of the Fair Work Act) does not reverse the onus of proof. This inconsistency is undesirable and it is not clear why a reversal of the onus of proof is justified.
41. A reversal of the onus of proof to an evidentiary standard may be justified where a matter is peculiarly within the knowledge of the affected individual.⁴⁰ The action being based on a reasonable concern of the employee about an imminent risk to his or her health or safety may be particularly within the knowledge of the employee (subparagraph 7(2)(c)(i) of the Bill). However, this does not appear to apply to subparagraph 7(2)(c)(ii) of the Bill in terms of determining whether the employee did not fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe and appropriate for the employee to perform.
42. Similar issues arise in relation to civil proceedings under clause 57 to do with unlawful picketing where the person would have to establish that their actions were not unlawful (legal burden of proof). While a person's intent may be particularly within a person's knowledge, proving lawful intention may be difficult. Further, given that the rule of law generally requires that the State prove its case against unlawful behaviour, if the reversal of the onus of proof is considered appropriate in this instance, it should be reduced to an evidential burden.
43. If a person wishes to rely on an exception or excuse in civil proceedings, under clause 93 they bear an evidential burden of proof. In the absence of justification in the Explanatory Memorandum for this approach, a concern arises that it may be a disproportionate response.

³⁶ Law Council of Australia, *Policy Statement: Rule of Law Principles* (March 2011) Principle 3, 3.
<<https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/PolicyStatementRuleofLaw.pdf>>

³⁷ *Ibid.*

³⁸ Building And Construction Industry (Improving Productivity) Bill 2013 [No. 2] (Cth), cl 7.

³⁹ Building And Construction Industry (Improving Productivity) Bill 2013 [No. 2] (Cth), cl7(2)(c) and 7(4)..

⁴⁰ Commonwealth Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011) 50.

Recommendations:

- **The reversals of the onus of proof where a legal burden is placed on the affected individual in clause 7 should be removed. If this is not accepted by the Committee, the reversals of the onus of proof in clause 7 should be reduced from a legal to an evidential burden.**
- **The burden of proof in clause 57 should be reduced to an evidential burden.**
- **The evidential burden of proof in clause 93, should be removed unless it is adequately justified in the Explanatory Memorandum.**

Reasonable excuse

44. Subclauses 76(3) and 77(3) provide for civil penalties for failing to comply with a request to a person to provide, respectively, their name and address and a record or document. Subclause 76(4) and subclause 77(4) provide that those provisions do not apply if the person has a 'reasonable excuse'. Subclause 99(8) also contains a 'reasonable excuse' defence in relation to compliance notices.
45. The defence of 'reasonable excuse' should generally be avoided because it is too open-ended.⁴¹ As noted in the Attorney-General's Department's *Guide to Framing Commonwealth Offences*:

...it is difficult to rely on because it is unclear what needs to be established. Equally, it may be difficult for the prosecution to respond to the defence, if raised.

The conduct intended to be covered by the defence of reasonable excuse may also be covered by the Criminal Code defences of general application in Part 2.3 of the Criminal Code, such as duress, mistake or ignorance of fact, intervening conduct or event, and lawful authority. Generally, reliance should be placed on Criminal Code defences, or (if these are insufficient) offence-specific defences adapted to the particular circumstances should be applied.⁴²

46. The Law Council agrees with this assessment.

Recommendation:

- **The defence of 'reasonable excuse' in the Bill should be removed. Reliance should be placed on the Criminal Code defences, or (if these are insufficient) offence-specific defences adapted to the particular circumstances should be applied.**

Retrospectivity

47. Item 2 of Schedule 2 of the Transitional Bill provides that the new coercive powers including the power to obtain information, apply in relation to any contravention or

⁴¹ Commonwealth Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011) 52.

⁴² *Ibid.*

alleged contravention of the BCII Act or the old Act that occurs *before* the transition time. To this extent the Transition Bill provides for the retrospective operation of coercive investigatory powers.

48. The Committee has previously noted:

*Any such powers, if they are to be introduced, **should operate prospectively**, and not allow the ABCC to initiate or pursue matters (including instigating court proceedings) in respect of matters that were settled prior to the new Act taking effect. It is a fundamental principle fairness and a basic precept of the rule of law that laws are applied prospectively. Parties should be entitled to rely upon the law as it exists and applies at the time.* [emphasis added]⁴³

49. The Law Council agrees with this assessment. The coercive powers in the ABCC legislation should operate prospectively. If this is not accepted by the Committee, the powers should only operate retrospectively if the conduct was an offence at the time it is alleged to have been committed.

50. Subclause 120(3) of the Bill appears to enable the rules to take effect retrospectively where they are made for the purposes of subsection 6(4) or 5 (meaning of building work) or 10(2) (extension of Act to Christmas Island and Cocos (Keeling) Islands). Subclause 120(3) provides that the rules may be expressed to take effect from the commencement of the subsection for which the rules are made, if those rules are made within 120 days after the subsection commences. The Explanatory Memorandum does not justify why this retrospective measure is necessary or proportionate.

Recommendations:

- **The coercive powers in the ABCC legislation should operate prospectively. If this is not accepted by the Committee, the powers should only operate retrospectively if the conduct was an offence at the time it is alleged to have been committed.**
- **If the delegations of legislative power are to remain in the Bill in subsection 6(4) or (5) or 10(2), the rules should apply prospectively unless sufficient justification is given to demonstrate the measure is necessary and proportionate.**

Penalties

51. The SSCSB has identified that the proposed penalties in clause 49 (payments relating to industrial action) is considerably higher than in the Fair Work Act.⁴⁴ With respect to clause 81 (penalty for contravention of civil remedy provision), it also noted that the provision of information about similar penalties in other Commonwealth legislation would allow it to better assess the appropriateness of increasing the penalties as proposed.⁴⁵

⁴³ Senate Standing Senate Standing Committees on Education and Employment, Parliament of Australia, *Report into the Building and Construction Industry (Improving Productivity) Bill 2013 and Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013* (2013) 19.

⁴⁴ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourth Report of 2014* (2014)

109.

⁴⁵ Ibid.

Recommendation:

- **The Committee inquire into the appropriateness of the proposed penalties.**

Exclusion of judicial review

52. Part 2, Schedule 1, item 2 of the Transitional Bill would have the effect that decisions made under the Bill would be excluded from the application of the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). The former Administrative Review Council (ARC) and the ABCC Commissioner recommended the removal of the exemption of ABCC decisions from the application of the ADJR Act. The ARC did so on the basis that the legislation:

... did not contain an appeals process within the legislation for application for judicial review writs. The only judicial review available is under s 39B of the Judiciary Act. In addition, the Building and Construction Industry Improvement Act contains occupational health and safety provisions which give the Federal Safety Commission accreditation powers. These are regulatory-type powers which would ordinarily be subject to ADJR Act review.⁴⁶

53. The SSCSB also noted in this context that:

The ADJR Act is beneficial legislation that overcomes a number of technical and remedial complications that arise in an application for judicial review under alternative jurisdictional bases (principally, section 39B of the Judiciary Act) and also provides for the right to reasons in some circumstances. The proliferation of exclusions from the ADJR Act is to be avoided.⁴⁷

54. The Law Council agrees with the assessment of the former ARC and the comments of the SSCSB.

Recommendation:

- **The proposed exemption of ABCC decisions in paragraph (a) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be removed.**

Merits Review – provision of reasons

55. Clause 28 would permit the Minister to terminate the appointment of an ABC Commissioner in specified circumstances. However, it does not include a requirement for the provision of reasons. There are many benefits in requiring reasons for decisions, including:

- providing fairness by enabling decisions to be properly explained and defended;
- assisting the person affected to decide whether to exercise rights of review or appeal;

⁴⁶ Administrative Review Council, *Federal Judicial Review in Australia*, Report No. 50 (2012) 205.

⁴⁷ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest No. 9 of 2013*, 11 December 2013, 2.

- improving the quality of decision making;
- promoting public confidence in the administration process; and
- assisting tribunals and courts to better perform administrative or judicial review.⁴⁸

56. In the absence of evidence otherwise, a statement of reasons should be provided to a Commissioner upon termination of an appointment.

Recommendation:

- **The Bill should be amended to require the Minister to provide a Commissioner with a statement of reasons upon termination of an appointment.**

Incompatibility with human rights

57. The PJCHR has previously formed the view that the:

- prohibition on picketing, and the further restrictions on industrial action, are incompatible with the right to freedom of association and the right to form and join trade unions;
- prohibition on picketing is likely to be incompatible with the right to freedom of assembly and the right to freedom of expression; and
- proposed sections 61(7)⁴⁹ and 105⁵⁰ are incompatible with the right to privacy.⁵¹ The PJCHR raised concern with respect to proposed section 61(7) that the coercive information gathering powers overriding any other law that prohibits the disclosure of information, including other Australian privacy laws, had not been adequately justified or addressed.⁵² Similarly, with respect to proposed section 105, the PJCHR considered that no specific and detailed analysis had been provided to offer sufficient justification for the limitation on the right to privacy.⁵³

58. The Law Council commends the PJCHR's report to the Committee's consideration for the purposes of determining whether the Bill is necessary and proportionate. To the extent that the Bill derogates from and limits the right to privacy as noted above, to:

⁴⁸ Administrative Review Council, *Commentary on the Practical Guidelines for Preparing Statements of Reasons*, November 2002.

⁴⁹ Clause 61 allows the ABC Commissioner to give written notice to a person requiring a person to give information, to produce documents or attend before the Commissioner (or an assistant) at a time, manner and if applicable, place specified in the notice. Subclause (7) clarifies that this clause is not limited by any other law that prohibits the communication of information, unless that law expressly excludes this clause from operating.

⁵⁰ Clause 106 deals with the confidentiality of information obtained under an examination notice, and restricts what an entrusted person can do with protected information.

⁵¹ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 Bills introduced 30 September-2 October 2014 Fourteenth Report of the 44th Parliament*, 28 October 2014, 106-113.

⁵² *Ibid.*

⁵³ *Ibid.*

- (a) assess whether such derogation is proportionate and legitimate in the circumstances: and
- (b) if the measures are determined to be proportionate and legitimate, to set out the controls or limitations for the use and disclosure of the personal information collected pursuant to the coercive powers of the Bill.

Recommendation:

- **In determining whether the Bill is necessary, proportionate and should be enacted, the Committee should have regard to the previous findings of the Parliamentary Joint Committee on Human Rights that the measures in the Bill are incompatible with Australia's voluntarily assumed human rights obligations relating to the: right to freedom of association, the right to form and join trade unions, the right to freedom of assembly; the right to freedom of expression and the right to privacy.**

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2016 Executive as at 1 January 2016 are:

- Mr S. Stuart Clark AM, President
- Ms Fiona McLeod SC, President-Elect
- Mr Morry Bailes, Treasurer
- Mr Arthur Moses SC, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Michael Fitzgerald, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.