Senate Education and Employment Legislation Committee

QUESTIONS ON NOTICE
Building and Construction Industry (Improving Productivity) Bill 2013 and Fair Work (Registered Organisations) Amendment Bill 2013

Melbourne
4 October 2016

Questions on notice taken by the CFMEU

1. Is the statement and video a reference to Chapter 7, Powers to obtain information in the *Building and Construction Industry (Improving Productivity) Bill*?

   Yes, the statement and video are largely based on the provisions of Chapter 7 of the Bill. However, the chapter cannot be read in isolation from other parts of the Bill including its Objects (Chapter 1), the functions of the ABC Commissioner (Chapter 2, Part 2) and Chapter 9 which includes the abrogation of the privilege against self-incrimination for recipients of ABCC examination notices (see below).

2. What rights to you say ice dealers have that workers have taken away as a result of the ABCC?

   Privilege Against Self-Incrimination

   The common law privilege against self-incrimination entitles a person to refuse to answer any question, or produce any document, if the answer or the production would tend to incriminate that person (see *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 335). The privilege has three limbs:

   - a privilege against self-incrimination in **criminal** matters;
   - a privilege against self-exposure to a **civil or administrative penalty** (including any monetary penalty which might be imposed by a court or an administrative authority, but excluding private civil proceedings for damages); and
   - a privilege against self-exposure to the forfeiture of an existing right.

   The privilege developed to protect individuals from testifying to their own guilt under the inquisitorial methods of the Star Chamber and ecclesiastic courts. It has been described as "a cardinal principle of our system of justice", (*Sorby's* case (1983) 152 CLR 281) a "bulwark of liberty", (*Pyneboard supra*) and "fundamental to a civilised legal system" *(Accident Insurance Mutual Holdings Ltd v McFadden and Another* (1993) 31 NSWLR 412) It is also recognised in international human rights law (International Covenant on Civil and Political Rights, Article 14.3(g)).

   The privilege applies unless expressly excluded by the clear terms of a statute.

A person accused of the criminal offence of supplying prohibited substances such as the drug ice, would be entitled to invoke the privilege against self-incrimination and refuse to answer questions either in the course of a police investigation or in any subsequent criminal trial.

For a person who is subject to an ABCC examination notice the privilege against self-incrimination cannot be invoked because the Bill expressly overrides the privilege (see section 102). It is a criminal offence to refuse to comply with a notice, including by refusing to answer questions on oath (see section 62). A person subject to an examination notice therefore has no real freedom to determine for themselves whether they should answer questions etc., whether those questions tend to incriminate them or not.

Legal Representation

The Building Worker

Under the current legislation, section 51 of the *Fair Work (Building Industry) Act 2012* provides as follows:

> *Representation by lawyer*
>
> *(3) The person may, if he or she so chooses, be represented at the examination by a lawyer* ***of the person's choice****.* (emphasis added)

In contrast, section 61of the Bill provides:

> *Legal representation*
>
> *(4) A person attending before the ABC Commissioner, or before an assistant, as mentioned in paragraph (2)(c) may be represented by a lawyer* ***if the person chooses****.*(emphasis added)

The current provision (s. 51 above) was included in the legislation following the decision of the Federal Court of Australia in the matter of *Bonan* v *Hadgkiss* [2006] FCA 1334.

In that matter, the Court found that the previous provisions of the *Building and Construction Industry Improvement Act* 2005, which were in almost identical terms to the 2013 Bill, gave the ABC Commissioner the discretion to exclude a person's chosen legal representative. The Court said '*In my opinion, he* (the Commissioner) *has the power to exclude a particular legal practitioner from acting or appearing for an examinee at an examination.'*(at para[53]).

The proposed repeal of s. 51 and its replacement with s. 61 of the Bill would mean that the decision in *Bonan* would again apply and examinees would no longer be guaranteed access to the legal representative of their choosing. The Coalition has designed the proposed section to correlate with the 2005 provisions with this specific object in mind.

The Ice Dealer

An ice dealer in all States has the right to communicate with the lawyer of their choice prior to being interrogated by the police. The legislation differs between States as to whether or not the police are obliged to defer questioning to enable a lawyer time to attend a police station and be present during any interview with an accused, but all States have legislation that reposes a right in an accused who is in custody to communicate with a lawyer of their choice (or friend, relative or other independent person).

In New South Wales for instance, when an accused is taken into custody, s 122 of *Law Enforcement (Powers and Responsibilities) Act* 2002 (***LEPRA***) requires that the custody manager for the relevant police station caution the accused, orally and in writing, that they do not have to say or do anything but that what they say or do may be used in evidence against them.

Section 123 of the *LEPRA* also mandates that prior to the police commencing an investigative procedure (which includes interviewing an accused), the relevant custody manager must inform the accused orally and in writing that:-

- they may communicate or attempt to communicate with an Australian legal practitioner of their choice; and
- they may ask that practitioner to attend the place where they are being detained to consult with them and/or for the legal practitioner to be present during the investigative procedure (i.e. the interview).

Non-Disclosure

Under the current Act, a person cannot be directed to *not* discuss the details of a coercive interrogation with any other person, including their family members (s. 51(6). This ensures that people interrogated by officials of the State are able to report and seek advice on measures adopted and used by officials during interrogations.

Under the Bill, that fundamental protection is removed. A 'non-disclosure order' of this kind was routinely imposed by the former ABCC on workers they interrogated before the current s. 51(6) was enacted. The power to make those kinds of orders is oppressive and unnecessary.

No such restrictions are imposed on suspects in criminal matters, including criminal matters of a most serious kind, such as the supply of prohibited drugs.

3. Isn't Chapter 7 just an evidence-gathering power similar to existing Court powers such as subpoenas, notices to produce and examination summonses?

Chapter 7 confers intrusive powers on the ABCC to compel people to produce documents or answer questions during the course of an investigation, upon pain of a criminal sanction, including imprisonment.

There are important differences between the coercive interview process and the use of subpoenas or other court processes. Firstly, subpoenas, notices to produce and the like are only available to litigants once proceedings are underway. They are not used as

part of a pre-trial evidence gathering process. Documents produced in response to a subpoena are provided to the court, which then supervises access to those documents by other parties to the litigation. In the case of an ABCC notice, the documents must be provided directly to the party that issues the notice unless the recipient takes steps to challenge the notice in the courts.

Court processes relating to subpoenas and the like are controlled in an open fashion by an independent court (staffed by judicial officers whose independence is underpinned by tenure of office), which is required to act judicially, including by balancing the interest of the applicant for the subpoena in obtaining relevant information, and the interest of the addressee in not being subjected to undue harassment, oppression or interference with privacy. In contrast, the coercive interview process under the Bill occurs in a closed interrogation room, and is controlled by the ABC Commissioner – a statutory office holder but not a judicial officer.

Further, the use of subpoenas etc., is closely supervised by the court which is the ultimate independent arbiter of the issues in dispute, not an investigator and potential prosecutor with an interest in the success of a future court proceeding.

The content of court documents such as subpoenas is subject to the direct supervision by the court. For example, as part of its control of proceedings, a court has the power to set aside, or refuse to issue a subpoena where:

- the applicant is seeking irrelevant information;
- the applicant is seeking relevant information, but it is not sufficiently particularised (i.e. the applicant is on a 'fishing expedition');
- answering the subpoena would be oppressive to the addressee; or
- the information held by the addressee is privileged (for example, under legal professional privilege).

Statutes and court rules require courts to hear and determine objections to the production of evidence and information if it is self-incriminatory or otherwise privileged (see for instance r 1.9(3) of the *Uniform Civil Procedure Rules* NSW (2005) and s 131A of the *Evidence Act* 1995 (NSW)). These provisions also mandate that documents that infringe the privilege against self-incrimination or are otherwise privileged are not to be produced to the party that issued the subpoena.

On the other hand, under the Bill, the terms and scope of any coercive notice is determined by the ABC Commissioner. There is little to stop ABC Commissioner (apart from the protests of the interviewee's lawyer, if present and, ultimately, resort to the courts), in their zeal to obtain information from calling persons in for 'fishing expedition' interviews; from harassing witnesses (through, for example, holding long interrogations); or from asking interviewees to reveal privileged information (which the witness might not know they have the right to withhold).

By contrast, a court has the discretion to decide the form in which a subpoena will be answered: whether any examination under subpoena is held in public or in private, who may conduct the examination, to whom the information or evidence may be

disclosed, etc. If (as is the usual case for oral information) the subpoena is answered in open court, the witness has the protection of:

- the fact that the prosecutor is restrained in their questioning by ethical duties owed to the court;
- the defence of a legal representative of their choosing (who is able to insist on the witness being given a chance to respond to allegations made against them); and
- the presence of an independent judge who monitors and controls the proceedings, and who can stop the examination if it becomes oppressive.

On the other hand, ABCC interviewers do not have any formal ethical duties to the interviewee or the community at large (besides their statutory employment duties to conduct themselves properly); they are not subject to the immediate oversight of a judge.

A person who is subpoenaed to attend court is entitled to conduct money and, in addition, may be entitled to be reimbursed for their expenses in complying with the subpoena (see for instance r 33.11 of the *Uniform Civil Procedure Rules* 2005 (NSW)). Persons interviewed by the ABCC may be put to considerable expense in attending an interview but are entitled to only limited expenses. Unlike under the current legislation, interviewees cannot claim legal costs under the Bill (s. 63(1)). A person who was subject to a subpoena which was challenged and set aside by the court would ordinarily be entitled to legal costs incurred in challenging a subpoena.

4. What do you say to the argument that you are comparing Apples and Oranges – Chapter 7 is for gathering evidence from people including bystanders whereas ice dealers are alleged criminals being charged with an offence?

We disagree. We are considering two important principles here:

- the privilege against self-incrimination and the deprivation of a citizen's freedom to determine for themselves whether or not they will co-operate with an investigative body, and
- the right to the legal representative of a person's choice to provide advice and assistance in the course of an investigation by a coercive arm of the State.

The privilege against self-incrimination applies in respect of both alleged civil and criminal contraventions unless Parliament expressly overrides the privilege by statute. In a public debate about the desirability of having Parliament override that fundamental right, it is a valid and legitimate comparison to put to the general public. Legal academics, law reform agencies and the courts regularly grapple the question of the proper scope of the privilege. It is important, indeed essential, that the general public also consider whether it is fair and/or desirable that one sector of the community, alleged criminals, should have the benefit of these protections whilst others, including innocent observers or those engaged in routine industrial disputes, should be compelled to comply and suffer a criminal sanction if they do not.

The same considerations apply in relation to the 'lawyer of choice' argument. In examining that principle it is entirely valid to look at the different circumstances in which that right should and should not apply.

There are other important aspects of the Bill which also warrant public scrutiny which did not necessarily arise in the advertisement. For example:

- Under the current Act, a presidential member of the Administrative Appeals Tribunal may, after being satisfied of certain minimum requirements, authorise a coercive notice before it is given to a member of the public.

  Under the Bill, the ABCC Director authorises the notices him/her self.

- Under the current Act, notices can only be authorised where other methods have been tried and were unsuccessful, or are not appropriate in the circumstances (s. 47(1)(d)).

  Under the Bill, coercive notices can be used by the ABCC as a measure of first resort.

- Under the current Act a person does not have to disclose information if the information is subject to legal professional privilege or where public interest immunity applies (s. 52(2)).

  These core common law rights are not contained in the Bill.

Dear Fact Checker,

We write to respond to your 'verdict' on the position put forward in a CFMEU campaign against the reintroduction of the ABCC, which includes a comparison between the rights of drug dealers under the criminal law and construction workers under the proposed ABCC laws.

We would have thought a publicly-funded institution which sets itself up as an arbiter or defender of truth would have very high standards when it comes to making definitive pronouncements about contentious and often complex issues. Unfortunately, your latest conclusion – an unequivocal one of 'nonsense' - falls well short on any objective analysis.

Here is our response:

1. You claim that the CFMEU is conflating two very different concepts but it is very difficult to know what you say those concepts are from your article. If you are saying one is a criminal process and one is civil, we have never said anything different to that. In fact we have been at great pains to make politicians, the media and the general public understand that the ABCC is a civil not a criminal investigator.

   You then very misleadingly say that '*A building worker suspected of committing a criminal offence has the same rights when interviewed by the police as an ice dealer would have.'* Of course that is correct, but you would very well know that is not the comparison that is being made. The comparison is between a construction worker being interviewed by the ABCC over a civil workplace contravention and a drug dealer being interviewed by police during a criminal investigation.

   Your article refers to the use immunity provisions of the Bill as a substitute for the privilege against self-incrimination. We are sure if you had looked you would have found a lot of legal and academic material about that argument, both for and against. But none of the counter argument finds its way into your piece.

   You need to show that a person being examined by the ABCC can refuse to answer questions, incriminating or not, to say that that the campaign point is nonsense. You get nowhere near that.

   'D-minus' for your efforts here.

2. You say that persons interviewed by the ABCC *'have their expenses paid'* and are *'entitled to be paid for their reasonable expenses in attending'*. Why then do you not say what we told you in writing, namely that unlike under the current legislation, interviewees cannot claim legal costs under the Bill (s. 63(1))? That is a clear point of distinction between the current and the proposed laws.

Legal expenses are the expenses that we expect most members of the public would be concerned about in a coercive interview situation. You chose not only to skate over that fact but give the public the impression, not once but twice, that they had no need to be concerned about the issue of expenses. This is grossly misleading and inaccurate, or perhaps just public advocacy by 'Fact Check' for the new laws.

We give you a straight out 'Fail' on this one.

3. You say that the reference to Malcolm Turnbull 'getting his way' is wrong on the basis that other laws have similar provisions. The fact that the Prime Minister recalled Parliament and has said he will take the country to a double dissolution election on the ABCC issue suggests to us that it is reasonable to say he wants to 'get his way' on this one.

   We call this the 'clutching at straws' or 'rolling the arm over' approach. Much more effort required.

4. You say that ABCC examinees 'are entitled to a lawyer of their choice, but ***there is a possibility that they will have to choose someone different…***'. That suggests to us that there might be a grain of truth to the lawyer of choice argument, yet you could not even manage to concede that there is any basis for this claim. Next time, you might want to consider quoting directly from the text of the legislation. We gave you that in writing. The current law says an examinee may '*…be represented at the examination by a lawyer* ***of the person's choice***'. The Government's Bill says '*may be represented by a lawyer* ***if the person chooses***.' Clearly the Turnbull Government thinks that the change of wording is meaningful and necessary or they would not be trying to 'get their way' on that issue.

   Fact Check would probably call this sort of approach 'cherry-picking'. In any case, we would be prepared to continue to argue this one in the court of public opinion rather than accept your 'verdict'.

   'D-minus' again.

5. Your '*These powers are nothing new'* point looks like a gratuitous attempt by Fact Check to 'strap up' the argument made by advocates of the ABCC laws. The campaign against the powers does not argue that forms of coercive powers do not exist anywhere else in the legal system. They are certainly unique in industrial law though. In fact, if you were able to point us and your readers to any other jurisdiction in the world where an industrial inspectorate has these powers we would be very interested.

   And if we had known this point was going to be raised it would have been better for you to follow the usual journalistic protocol and give the union notice that this was happening and an opportunity to respond.

Poor form. Your veil of objectivity is slipping.

'D' at best.

6. You then attempt to make out the case that the Bill does not target workers even though you quote some figures that show that more than two thirds of these notices were directed to workers over a six year period. This really is a brave foray into 'fact checking'. We were waiting for the killer point but it did not come. Instead, your 'analysis' flips back to the point about the power being used to examine those suspected of committing a criminal offence on a building site. Remember, investigation of criminal offences is not what these powers are about. Readers of Fact Check must be very confused by now.

   Your reference to a CFMEU submission to the Trade Union Royal Commission is wrong. The CFMEU made no such submission to the Royal Commission. The Royal Commission report refers to a CFMEU submission to a Senate Committee Inquiry. This might be a small error in the scheme of the other ones, but one that accurate and careful research would have avoided. Remember, footnotes can be important in the business of fact checking.

Overall a very poor performance.

Your readers deserve better.