

Senate Education and Employment Legislation Committee

**Building and Construction Industry (Improving Productivity) Bill 2013
Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013**

26 November 2013

Questions on Notice

Senator Cameron asked, Hansard p.33:

Question

Senator CAMERON: Yes, on page 205-206 of N1 Volume 11. If you could just advise the committee on what Commissioner Cole recommended in relation to—

Ms Parker: Coercive powers?

Senator CAMERON: Yes, to coercive powers. Just tell us what he said. Can you also go to Justice Murray Wilcox and the checks and balances he recommended. Were any of the officers here—

Ms Parker: Sorry, Senator, do you want us to tell you on notice what they said?

Answer

Royal Commission into the Building and Construction Industry

The 2003 Cole Royal Commission, in Volume 11: Reform – Achieving Cultural Change, pp. 49 - 50, made the following observations and recommendations in relation to oversight of the operations of the Australian Building and Construction Commission (ABCC):

“Oversight of ABCC’s operation

205 As the chairman and members of the ABCC will be ‘officers of the Commonwealth’, such persons will be amenable to judicial review pursuant to s39B of the *Judiciary Act 1903 (C’wth)*.

206 The terms of the *Administrative Decisions (Judicial Review) Act 1977 (C’wth)* ought to apply to the ABCC, according to its terms. In this regard I note that, by operation of Schedule 2 of the Act the statutory obligation arising from s13 of that Act to provide reasons for certain decisions, does not apply to decisions relating to the administration of criminal justice or decisions in connection with the institution or conduct of proceedings in a civil court, including for the recovery of pecuniary penalties arising from contraventions of enactments and related matters.

207 The *Freedom of Information Act 1982 (C’wth)* also ought to apply, according to its terms, to the ABCC, although, of course, a number of exemptions will be available in relation to information held by the ABCC.

208 The ABCC should submit an Annual Report to its minister on its operations. The report should be sufficiently detailed to allow analysis of the scope and effectiveness of its work. In particular the report should contain statistics about the number and categories of complaints and reports made to the ABCC, and the manner of their disposition. It should also contain estimates of the cost of unlawful industrial action in the year concerned and the amount of employee entitlements recovered from employers found to have breached awards and agreements. The Minister would table the Annual Report in the Parliament.

209 These two methods of oversight, coupled with the capacity to seek judicial review of the exercise of the ABCC's statutory powers, should prove adequate, while not interfering with its independence.

Issue

As a Commonwealth agency, the Australian Building and Construction Commission should be subject to prudential oversight. One alternative is the creation of a special Ombudsman to oversee its operations. An alternate method of prudential oversight is for the Australian Building and Construction Commission to fall within the jurisdiction of the Commonwealth Ombudsman, and to require the Australian Building and Construction Commission to report annually upon its operations.

Recommendation 196

The Australian Building and Construction Commission report annually to the responsible Minister, such report to be tabled in each House of the Parliament. Such report shall include information on the number and types of matters investigated, the amount of employee entitlements recovered from recalcitrant employers, and the aggregate cost of unlawful industrial action in the industry.

Recommendation 197

The Australian Building and Construction Commission be subject to the jurisdiction of the Commonwealth Ombudsman."

Wilcox Report

The Wilcox Report made recommendations in relation to the use of compulsory examination powers (Chapter Six – Safeguards, pp. 76-77) as follows:

"Recommendation 4:

The use of compulsory interrogation be subject to the following safeguards:

- (i) a notice to a person compulsorily to attend for interrogation be issued only by a presidential member of the Administrative Appeals Tribunal who is satisfied by written material, which may include evidence on the basis of "information and belief", that:

- (a) the Building and Construction Division has commenced an investigation into a particular suspected contravention, by one or more building industry participants, of the *Fair Work Act*, an “industrial law”, as defined by that Act, or an industrial instrument made under that Act;
 - (b) there are reasonable grounds to believe that a particular person has information or documents relevant to that investigation, or is capable of giving evidence that is relevant to that investigation;
 - (c) it is likely to be important to the progress of the investigation that this information or evidence, or those documents, be obtained; and
 - (d) having regard to the nature and likely seriousness of the suspected contravention, any alternative method of obtaining the information, evidence or documents and the likely impact upon the person of being required to do so, insofar as this is known, it is reasonable to require that person to attend before the Director or a Deputy Director and answer questions and/or produce documents relevant to the investigation;
- (ii) the Director or a Deputy Director of the Building and Construction Division preside at all compulsory interrogations;
 - (iii) the Commonwealth Ombudsman monitor proceedings at all compulsory interrogations and for that purpose the Director:
 - (a) promptly notify the Commonwealth Ombudsman of the issue of all notices to attend for interrogation; and
 - (b) promptly after the interrogation, supply to the Commonwealth Ombudsman a report, a video recording of the interrogation and a copy of any written transcript; and
 - (iv) the Commonwealth Ombudsman report to Parliament annually, and otherwise as required, concerning the exercise of the power of compulsory interrogation.

Recommendation 5:

The legislation authorising compulsory interrogation provide for:

- (i) payment to persons summoned for interrogation of their reasonable expenses (travelling, accommodation and legal, as may be) and any loss of wages or other income; and
- (ii) recognition and availability of client legal privilege and public interest immunity.”

Senator Cameron asked, Hansard p.35:

Question

Senator CAMERON: I am happy for you to take it on notice. Can you take it on notice and give us the reasoning for the AAT being put into the current act and the reasoning for the removal of the AAT from the bill?

Answer

The Transition to Fair Work Australia for the Building and Construction Industry Report (the Wilcox Report) recommended a role for AAT Presidential Members on grounds that the nature of the examination notice process warranted oversight by an independent person. The Report looked to comparable legislation and found that members of the AAT were best placed to fulfil this function.

The requirement for the ABC Commissioner to apply to an AAT Presidential Member does not appear in the Building and Construction Industry (Improving Productivity) Bill 2013 (the Bill) because of the potential for the process to unnecessarily delay investigations and reduce the Commissioner's ability to quickly and effectively obtain information.

As noted in the Explanatory Memorandum, the Bill contains a number of safeguards to ensure that the examination notice process is implemented appropriately.

Firstly, in light of the careful consideration that should be given to the use of this power and the scrutiny that it should entail, the ABC Commissioner's power to give a written notice to a person can only be delegated to a Deputy Commissioner or, if none have been appointed, an SES employee. This will ensure that the application of this power is only undertaken by the people most accountable for its use.

Where a person has been required to appear before the ABC Commissioner or an assistant, the person may be represented by a lawyer if the person chooses. This ensures that the person in question is not disadvantaged and is able to be appropriately represented.

The time for an examination to take place must be at least 14 days after the notice is given, ensuring that the person on whom the notice is served will have an adequate opportunity to seek advice and arrange legal representation if they so choose.

Finally, a person who attends an examination as required by an examination notice is entitled to be paid fees and allowances, fixed by or calculated in accordance with the rules, for reasonable expenses (other than legal expenses) incurred by the person in attending the examination. This will ensure that the person is not financially disadvantaged as a result of being required to attend an examination.

An additional level of oversight to the examination notice process is provided for by the role of the Commonwealth Ombudsman. When the ABC Commissioner issues an examination notice, he or she is also required to notify the Commonwealth Ombudsman that the examination notice has been issued and provide the Ombudsman with a copy of the examination notice. As soon as practicable after the examination of a person takes place, the Commissioner must provide the Commonwealth Ombudsman with a report on the examination, a video recording of the examination and transcript of the examination. The Commonwealth Ombudsman is required to review the exercise of powers in relation to examination notices and provide a report to Parliament as soon as practicable after the end of each financial year about the examinations conducted during that year.

Senator McKenzie asked, Hansard p.37:

Question

CHAIR: A lot of the debate this morning has centred on the reliability and validity of the Independent Economics report used by the Master Builders. Has the department used Independent Economics to provide any advice over the last five years?

Ms Parker: No.

CHAIR: Any of its portfolio agencies?

Mr Kibble: Not that we are aware of, but we can take that on notice.

Ms Parker: We can check that.

Answer

The Department of Education, Employment and Workplace Relations (DEEWR) commissioned KPMG Econtech in 2009 to provide an estimate of the total economic benefits of a suite of human capital reforms, as measured by their impact on productivity, labour force participation, Gross Domestic Product and employment. The final report, *Measuring the Impact of the Productivity Agenda*, was released publicly on 26 May 2010. The Department of the Treasury also stated at the Senate Economics Committee on 1 July 2010, that it had commissioned KPMG Econtech to provide economic modelling advice in relation to *Australia's Future Tax System Review*.

Senator Cameron asked, Hansard p.37:

Question

Senator CAMERON: Yes, can you make sure you take that on notice: what is the definition of 'industrial character'?

Answer

Clause 47 of the Building and Construction Industry (Improving Productivity) Bill 2013 prohibits certain picketing action that is either motivated by a particular purpose or is otherwise unlawful. Subparagraph 47(2)(b)(i) and (ii) prohibits picketing action that is motivated for the purposes of:

- supporting or advancing claims against a building industry participant in respect of the employment of employees or the engagement of contractors (subparagraph (2)(b)(i)); or
- advancing industrial objectives of a building association (subparagraph (2)(b)(ii)).

The definition of 'industrial motivation' in section 36 of the *Building and Construction Industry Improvement Act 2005* was adapted for subparagraph 47(2)(b)(i) and (ii).