

Ai GROUP & ACA SUBMISSION

Senate Education and Employment
Legislation Committee

**Construction Industry Amendment
(Protecting Witnesses) Bill 2015**

APRIL 2015



Ai Group and ACA Submission to Senate Education and Employment Legislation Committee

About Australian Industry Group

The Australian Industry Group (Ai Group) represents industries with around 440,000 businesses employing around 2.4 million people. Ai Group and its affiliates have approximately 60,000 members and employ in excess of 1.25 million employees. Ai Group has a large membership in the construction industry including both major builders and large and small subcontractors.

About the Australian Constructors Association

The Australian Constructors Association (ACA) is a national industry association which represents Australia's major construction contractors. ACA member companies have a combined annual revenue in excess of \$50 billion and employ over 100,000 people in their Australian and international operations.

Ai Group contact for this submission

Stephen Smith, Head of National Workplace Relations Policy

ACA contact for this submission

Lindsay Le Compte, Executive Director

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Summary of Ai Group's and the ACA's position on the Bill

The Australian Industry Group (Ai Group) and the Australian Constructors Association (ACA) strongly support the *Construction Industry Amendment (Protecting Witnesses) Bill 2015*.

The Bill, in effect, would extend the examination powers of the Director of Fair Work Building and Construction (FWBC) by two years. Under the *Fair Work (Building Industry) Act 2012*, the examination powers are currently set to expire on 1 June 2015.

There is simply no valid case for the abolition of the examination powers when the CFMEU and other construction unions continue to break the law on a very regular basis.

As stated by Justice Heydon in his December 2014 *Interim Report of the Royal Commission into Trade Union Governance and Corruption*:

*"Part 8 is the largest part of the Interim Report. It contains a number of case studies associated with the CFMEU. Together they raise fundamental issues about the regulation of the building and construction industry, and the culture of wilful defiance of the law which appears to lie at the core of the CFMEU."*¹

On 26 February 2015, FWBC Director Mr Nigel Hadgkiss gave the following evidence to the Education and Employment Legislation Committee during Senate Estimates:

"Mr Hadgkiss: Just as an overview, the agency has 129 current investigations. We have 43 proceedings currently before the court. That is as at the end of January. Forty per cent of those relate to coercion. We have some 72 CFMEU officials before the court, ranging from the national secretary to, I think, five state secretaries, seven assistant secretaries and so on. During the past year we have initiated 283 investigations and there was a 505 per cent increase in right of entry breaches reported. Thirty-nine proceedings in court were initiated during the past year and coercion had increased exponentially; likewise industrial action. We finalised 11 proceedings during the year. Forty-five per cent of those were found by the courts to be breaches of right of entry and 19 per cent were coercion. Overall, going back to ABCC days and FWBC, we have a 91 per cent success rate in our prosecutions. I can go on if you wish."

The examination powers of FWBC are vital to ensure the maintenance of the rule of law in the construction industry. As Justice Merkel of the Federal Court said some years ago when imposing fines on two militant Victorian union leaders for ignoring a Court order:

"The rule of law in a democratic society does not permit any member of that society, no matter how powerful, to pick and choose the laws or court orders that are to be observed and those that are not."

Australian Industry Group v AFMEPKIU and others [2000] FCA 629 (12 May 2000)

We urge the Senate Committee to recommend that the Bill is passed by Parliament without delay.

¹ *Interim Report of the Royal Commission into Trade Union Governance and Corruption (2014), Volume 1, Page 26*

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The examination powers

The examination powers have been in place since June 2005² and have operated fairly and appropriately throughout this whole period.

The examination powers are similar to those possessed by the Australian Securities and Investments Commission (ASIC), the Australian Competition and Consumer Commission (ACCC) and the Australian Taxation Office (ATO). Accordingly, there is nothing particularly exceptional about the powers, but it is vital that they be maintained.

The examination powers were a key recommendation of the Royal Commission into the Building and Construction Industry.³

In March 2009, Justice Wilcox reviewed the examination powers and found that the Regulator *“will need a power of coercive interrogation; at least under present conditions”*.⁴ Notably the conditions at the time were much better than they now are. Since 2009, the conduct of the CFMEU has deteriorated markedly as is evident from the large number of recent prosecutions and the large number of cases currently before the Courts.

Justice Wilcox recommended that the examination powers be reviewed after 5 years and that a sunset provision is included *“in order to ensure review”*.⁵ Justice Wilcox did not recommend that the powers be abolished after 5 years.

The Explanatory Memorandum for the *Fair Work (Building Industry) Act 2012* states, in reference to the sunset provision, that: *“It is intended that, before the end of that period, the Government would undertake a review into whether the compulsory examination powers continue to be required.”*⁶

Accordingly, the intention of the sunset provision in the Act is that the powers are reviewed before 1 June 2015, not that the powers be discontinued. It is beyond contention that the powers are still required.

The examination powers are subject to very substantial protections including:

- A Presidential Member of the Administrative Appeals Tribunal must issue an examination notice before the Director is able to use the examination powers;

² Originally the powers were given to the Building Industry Taskforce which was replaced by the ABCC on 1 October 2005 under the *Building and Construction Industry Improvement Act 2005*. The *Building and Construction Industry Improvement Act 2005* was replaced by the *Fair Work (Building Industry) Act 2012*.

³ Final Report, Recommendation 184.

⁴ Justice Wilcox, *Transition to Fair Work Australia for the Building and Construction Industry*, March 2009, Paragraph 5.109.

⁵ Recommendation 4.

⁶ Explanatory Memorandum, paragraph 125.

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- The Commonwealth Ombudsman must monitor and review the exercise of the examination powers, including:
 - Receiving a copy of all examination notices;
 - Receiving a report of every examination;
 - Receiving a video recording of every examination; and
 - Receiving a transcript of every examination.
- The Commonwealth Ombudsman is required to report to Parliament annually on the use of the examination powers. In each annual report since this requirement was introduced, the Commonwealth Ombudsman has reported that all examinations have been conducted in accordance with legislative requirements and best practice principles.
- A person may be represented at an examination, if he or she chooses.
- An examination must not take place until at least 14 days after the notice is given to the person.
- A person who attends an examination is entitled to be paid fees and allowances for reasonable expenses (including legal expenses).

History shows that the CFMEU will not cooperate with the Regulator unless the examination powers exist. Prior to the powers being implemented in June 2005, the CFMEU adopted a blanket policy of its officers, staff and delegates refusing to be interviewed by the Regulator, which frustrated many investigations into unlawful conduct.

Many company witnesses prefer to be the subject of a compulsory examination by the Regulator to reduce union coercion and intimidation against them for giving evidence.

The unions' self-serving assertions that the examination powers are "draconian" are nonsense.

Accordingly, Ai Group and the ACA urge the Committee to recommend that the *Construction Industry Amendment (Protecting Witnesses) Bill 2015* is passed by Parliament without delay.

Building and Construction Industry (Improving Productivity) Bill 2013

In addition to the passage of the *Construction Industry Amendment (Protecting Witnesses) Bill 2015* through Parliament, it is essential that the *Building and Construction Industry (Improving Productivity) Bill 2013* is passed by the Senate without delay.

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As a result of the current inadequate laws regulating workplace conduct in the construction industry there has been an outbreak of unlawful industrial action and unlawful coercion on building sites by construction industry unions such as the CFMEU. The situation is worsening by the day.

The current inadequate laws are resulting in higher construction costs which of course reduce the ability of Federal and State Governments to deliver vital community infrastructure.

Our views on the *Building and Construction Industry (Improving Productivity) Bill 2013* are set out in our submissions to the two Senate Committee inquiries into this Bill.