

## **Bills requiring further information to determine human rights compatibility**

### **Building and Construction Industry (Improving Productivity) Bill 2013**

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

*Portfolio: Employment*

*Introduced: House of Representatives, 14 November 2013*

#### **Summary of committee concerns**

1.1 The committee seeks further information on various aspects of these bills to determine their compatibility with the right to equality and non-discrimination, the right to freedom of association and to engage in collective bargaining, the right to freedom of assembly, the right to freedom of expression, the right to privacy, the right to a fair hearing, and the prohibition against self-incrimination.

#### **Overview**

1.2 These two bills give effect to the government's election commitment to re-establish the Australian Building and Construction Commission (ABCC).

1.3 The bills replicate provisions which have previously been in force in legislation in Australia. Following the Royal Commission into the Building and Construction Industry conducted by the Hon Terence Cole QC, which reported in 2003, the then government introduced the *Building and Construction Industry Improvement Act 2005* (the 2005 Act).<sup>1</sup> The 2005 Act implemented many of the recommendations of the Royal Commission and established the Office of the Australian Building and Construction Commissioner. While the 2005 Act was aligned with the *Workplace Relations Act 1996* and mirrored certain of its provisions, the 2005 Act specifically targeted the building and construction industry. It made unlawful a range of actions which had been identified by the Royal Commission as prevalent in the industry, included the power to impose significant civil and criminal penalties, and conferred on the ABCC a range of coercive investigative and enforcement powers.

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1 *Final Report of the Royal Commission into the Building and Construction Industry* (2003), 22 volumes plus confidential volume.

1.4 In 2012, the then government replaced the 2005 Act with the *Fair Work (Building Industry) Act 2012* (the 2012 Act).<sup>2</sup> This followed an inquiry by the Hon Murray Wilcox QC into the possible operation of a specialist building and construction division of the proposed new Fair Work Australia.<sup>3</sup> In doing so, Mr Wilcox considered the operation of various provisions of the 2005 Act, including their continued need, and additional safeguards that would be appropriate if such provisions were retained.

1.5 The 2012 Act abolished the ABCC and created a new agency, the Office of the Fair Work Building Industry Inspectorate, currently operating as Fair Work Building and Construction (FWBC). The role of this agency is to assist and monitor the implementation of workplace relations laws in the building and construction industry by providing education and advice and undertaking compliance activities. The 2012 Act also removed the provisions making certain industrial actions unlawful and imposing higher penalties on building industry participants and introduced a range of additional safeguards to support the investigative powers.

1.6 The current bills remove the changes made by the 2012 Act and re-introduce many of the provisions of the 2005 Act. According to the statement of compatibility accompanying the main bill, 'the Bill is intended to substantially replicate the *Building and Construction Industry Improvement Act 2005*'.<sup>4</sup>

#### *Building and Construction Industry (Improving Productivity) Bill 2013*

1.7 The Building and Construction Industry (Improving Productivity) Bill 2013 (the main bill) re-establishes the ABCC by replacing the existing Office of the Fair Work Building Industry Inspectorate (or FWBC). The bill:

- establishes the ABCC and appoints the Australian Building and Construction Commissioner (the ABC Commissioner), including the terms and conditions of the Commissioner, the staff of the Commission and the people who assist the Commissioner;<sup>5</sup>
- allows the Minister to issue a Building Code – a code of practice that persons working in the industry must comply with;<sup>6</sup>

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2 The amendments were affected by the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act 2012*, which changed the title of the *Building and Construction Industry Improvement Act 2005* to the *Fair Work (Building Industry) Act 2012*.

3 The Hon Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction Industry Report*, March 2009.

4 Statement of compatibility, p 50.

5 Chapter 2 of the bill.

6 Chapter 3 of the bill.

- continues the role of the Federal Safety Commissioner and deals with the appointment and functions of the Commissioner;<sup>7</sup>
- prohibits 'unlawful industrial action' or 'unlawful picketing' (which includes bans on working, employees failing to attend work or employers locking out employees), subjects a person who engages in such conduct to a 'Grade A civil penalty', and provides for the ability of 'any person' to apply for injunctions to restrain unlawful industrial action or unlawful picketing;<sup>8</sup>
- prohibits actions relating to constitutionally-covered entities which involve the coercion of, or application of undue pressure on, persons in relation to the engagement of contractors and employees, choice of superannuation fund and enterprise bargaining;<sup>9</sup>
- confers on the ABCC powers to require persons to give information, produce documents or answer questions relating to the investigation of a suspected contravention of the bill or a designated building law by a building industry participant and creates an offence for non-compliance;<sup>10</sup>
- provides for the appointment and powers of Australian Building and Construction Inspectors and Federal Safety Officers, including powers to enter premises, to ask a person's name and address and to require production of records or documents and creates civil penalties for non-compliance;<sup>11</sup> and
- allows for the enforcement of requirements under the bill before a court (including the imposition of pecuniary penalties and injunctions and the rules relating to civil penalty proceedings) and enables the use of enforceable undertakings and compliance notices.<sup>12</sup>

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7 Chapter 4 of the bill.

8 Chapter 5 of the bill.

9 Chapter 6 of the bill.

10 Chapter 7 of the bill.

11 Chapter 7 of the bill.

12 Chapter 8 of the bill.

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

1.8 The Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 (the consequential bill) seeks to repeal the 2012 Act. It continues appointments of officers and staff of the Office of the Fair Building Industry Inspectorate and related positions, under the Australian Building and Construction Commission. It also confirms the continuing validity of actions taken and notices issued, and investigations commenced, under the previous legislation.

1.9 The bill provides that in general, the bill is to operate prospectively.<sup>13</sup> However, the bill provides that the information gathering powers will have effect in relation to any (alleged) contravention of the 2005 or 2012 Acts that occurred before the commencement of this legislation.<sup>14</sup> It also provides that the ABC Commissioner or an inspector may begin or participate in a proceeding even if the proceeding relates to a matter that was settled before the commencement of the bill.<sup>15</sup>

### **Consideration by other committees**

1.10 On 14 November 2013, the bills were referred to the Senate Education and Employment Legislation Committee. That committee called for submissions on 15 November with a deadline of 22 November 2013, and reported on 2 December 2013.<sup>16</sup> The report of the majority of the committee (comprising government senators) recommended that the bills be passed; dissenting reports by Labor Senators and the Australian Greens' Senators recommended that the bills not be passed.

1.11 On 4 December 2013, the bills were referred to the Senate Education and Employment References Committee, which is due to report on the last sitting day of the Autumn session (27 March 2014). The reference to that committee includes a number of specific questions about the government's proposed reintroduction of the ABCC, including whether the bills are consistent with Australia's obligations under international law.<sup>17</sup>

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13 Schedule 2, section 2(1).

14 Schedule 2, section 2(3).

15 Schedule 2, section 20.

16 Senate Education and Employment Legislation Committee, *Building and Construction Industry (Improving Productivity) Bill 2013 [Provisions] and Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [Provisions]*, 2 December 2013.

17 Senate Education and Employment References Committee, *Government's approach to re-establishing the Australian Building and Construction Commission*. The terms of reference for this inquiry can be found on the committee's website.

1.12 The Senate Committee for the Scrutiny of Bills considered the bills in its Alert Digest No 9 of 2013, published on 11 December 2013. That committee raised a number of concerns with the bills.<sup>18</sup>

## **Compatibility with human rights**

### ***Statement of compatibility***

1.13 Each of the bills is accompanied by a statement of compatibility.

1.14 The statement of compatibility accompanying the main bill identifies that the bill engages the right to freedom of association,<sup>19</sup> the right to just and favourable conditions of work (including the right to safe and healthy working conditions),<sup>20</sup> the right to a fair trial,<sup>21</sup> the right to freedom of assembly,<sup>22</sup> the right to freedom of expression<sup>23</sup> and the right to privacy.<sup>24</sup> The statement of compatibility provides a detailed discussion of the rights engaged and argues that any limitations on those rights are justifiable. The statement concludes that the bill 'is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate'.<sup>25</sup>

1.15 The statement of compatibility accompanying the consequential bill states that the bill engages and limits the right to privacy (in relation to the protection and disclosure of personal information under the bill). It concludes that the bill 'is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate'.<sup>26</sup>

The committee considers that, in relation to the main bill, the statement of compatibility does not include information and data which is necessary for an assessment of the human rights compatibility of the bill. On various occasions, the statement of compatibility (and the explanatory memorandum) make assertions or statements of fact which are not demonstrated by reference to supporting data.

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18 See Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No 9 of 2013*, pp 1-18.

19 Article 22 of the International Covenant on Civil and Political Rights (ICCPR) and article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

20 Article 7 of the ICESCR.

21 Article 14 of the ICCPR.

22 Article 21 of the ICCPR.

23 Article 19 of the ICCPR.

24 Article 17 of the ICCPR.

25 Statement of compatibility, p 65.

26 Statement of compatibility, p 11.

**1.16 The committee considers that inclusion of relevant supporting information and data in the statement of compatibility would have assisted it in its assessment of the human rights compatibility of the main bill.**

***Committee view on compatibility***

1.17 The committee recognises that many issues relating to industrial relations legislation have been and continue to be contentious. The committee acknowledges that there are a range of policy approaches that may be adopted in relation to the regulation of labour and employment relations. The committee's mandate is to ensure that, whatever policies are adopted, the legislation giving effect to those policies is consistent with Australia's international human rights obligations.

1.18 This committee, and its predecessor committee, have set out the principles and framework that guide its scrutiny of bills and legislative instruments in its previous reports, and in its practice notes (in particular, Practice Note 1). The committee's analysis of the bills proceeds on this basis.

1.19 The bills give rise to a number of human rights concerns. The introduction of a separate legislative regime applying only to some workers and employers raises issues of equality and non-discrimination, both in relation to equal protection under the law and the right to non-discrimination in relation to rights under the relevant Covenants.<sup>27</sup> These concerns arise in relation to the proposed scheme as a whole and also in relation to specific provisions of the bills. The bills also give rise to concerns relating to the substantive rights themselves, including the right to freedom of association,<sup>28</sup> the right to freedom of assembly,<sup>29</sup> the right to privacy<sup>30</sup> and the right not to incriminate oneself.<sup>31</sup> These concerns are addressed below.

***Right to equality and non-discrimination***

1.20 The bills are part of a legislative scheme which is targeted at a particular sector of the economy, namely those engaged in certain parts of the building and construction industry. It involves the introduction of prohibitions on specific forms of industrial activity that apply only to those engaged in that part of the industry, supported by significant investigative powers and civil and criminal penalties which are also applicable only to those workers and employers who fall within the scope of

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27 Articles 2(1) and 26 of the International Covenant on Civil and Political Rights (ICCPR) and article 2(2) of the International Covenant on Economic Social and Cultural Rights (ICESCR).

28 Article 22 of the ICCPR.

29 Article 21 of the ICCPR.

30 Article 17 of the ICCPR.

31 Article 14(3)(g) of the ICCPR.

the legislation. The maximum penalties that may be imposed on building industry participants appear to more severe than those that may be imposed on participants in other industries for the same or substantially similar conduct.

1.21 The committee recognises that it is permissible to enact legislation relating to particular forms of economic or social activity. However, singling out a particular group of workers in a specific sector of the economy and subjecting them to a different range of prohibitions and an accompanying investigative and enforcement regime, may give rise to human rights concerns.

1.22 The right to equality and non-discrimination guarantees equal protection under the law.<sup>32</sup> This requires that legislative distinctions not discriminate between people on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or 'other status'. Being a person engaged in the building industry would constitute an 'other status' within the meaning of this right. Similarly, the right to equality and non-discrimination guarantees persons the rights set out in the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) without discrimination on the basis of grounds such as those mentioned above, including 'other status'.<sup>33</sup> For example, all workers are entitled to the same rights at work, including freedom of association and trade-union rights.

1.23 However, not every distinction based on a protected status is discriminatory. If a difference in treatment can be shown to be based on objective and reasonable criteria and to be a proportionate measure adopted in pursuit of a legitimate goal, then it will not violate the guarantee of equality and non-discrimination.

1.24 In relation to the present bills, the government must show that there are objective and reasonable grounds for adopting a specific legislative regime applicable only to the building and construction industry and that it is a proportionate measure in pursuit of a legitimate objective. The bills are based on the claim that the practices addressed are endemic to and widespread in the building industry as compared with other industries. Assessment of compatibility involves an assessment of whether the asserted factual basis for the differential treatment is supported by evidence, whether the measures in the bill are reasonably tailored to addressing those distinctive features of the sector in question, and whether the measures appear overall to be a proportionate measure.

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32 Article 26 of the ICCPR.

33 Article 2(1) of the ICCPR and article 2(2) of the ICESCR.

### *Distinctiveness and the scheme as a whole*

1.25 The explanatory materials accompanying the bill argue that the specific legislative regime is necessary on the ground that the building and construction industry is distinctive. This is because the extent of industrial disruption and lawlessness to be found in the building and construction industry, as well as the distinctive nature of some of the forms of industrial action to be found in that sector, are of a nature and dimension that set the industry apart from other industries and a separate more stringent regime of industrial regulation is therefore required. According to the explanatory memorandum, the 2003 Royal Commission 'established that building sites and construction projects were hotbeds of intimidation, lawlessness, thuggery and violence'.<sup>34</sup> The creation of the original ABCC under the 2005 Act was 'directed at the unique nature of the building industry, and addressed specific inappropriate and unlawful behaviour which the Royal Commission found was prevalent in the building industry'.<sup>35</sup>

1.26 The explanatory material also refers to the significance of the building and construction industry for the national economy. According to the Minister's second reading speech, the industry:

is critical to a productive, prosperous and internationally competitive Australia. The Coalition Government recognises the importance of an industry that is vital to job creation and essential to Australia's economic and social well-being.<sup>36</sup>

1.27 On this basis, the government argues that stringent industrial laws are a permissible and effective way of pursuing the legitimate goal of reducing the disruption and lawlessness endemic in the industry and thereby increasing productivity in the industry and the broader economy. According to the explanatory memorandum:

[w]hile the ABCC existed, the performance of the building and construction sector improved. For example, industry productivity improved, Australian consumers were better off and there was a significant reduction in days lost through industrial action.<sup>37</sup>

1.28 The explanatory materials state that since the abolition of the ABCC under the 2012 Act, 'standards of behaviour in the industry have declined. The industry has returned to the "bad old days" where disputes are violent and there exists thuggery and disregard for the rule of law'.<sup>38</sup> To demonstrate this, the explanatory material

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34 Explanatory memorandum, p 2.

35 Explanatory memorandum, p 2.

36 The Hon Christopher Pyne MP, Minister for Education, Second reading speech, *House of Representatives Hansard*, 14 November 2013, p 265.

37 Explanatory memorandum, p 2.

38 Explanatory memorandum, p 2.

and the Minister in his second reading speech describe a number of recent incidents as evidence that the 'lawlessness' has returned.<sup>39</sup>

1.29 In order for the committee to carry out its assessment, it must evaluate the factual basis of assertions regarding the distinctiveness of the building and construction industry and the effectiveness of the scheme proposed. The committee is concerned that in a number of respects the statement of compatibility and explanatory memorandum do not contain such material.

*Distinctiveness and the need for certain specific measures*

1.30 The distinctiveness argument is made both in relation to the proposed legislative regime generally, but is also relied on in support of specific legislative provisions. The explanatory memorandum maintains that there are certain forms of conduct that are peculiar to the building and construction industry or overwhelmingly to be found in that industry, justifying both specific prohibitions and the special investigative and penalty regime. However, the explanatory memorandum and statement of compatibility do not provide any supporting data.

1.31 For example, the main bill proposes the introduction of a new prohibition on certain forms of picketing, backed by extensive coercive powers and higher penalties than apply to other cases of such behaviour.

1.32 The statement of compatibility states that:

This limitation pursues the legitimate aim of prohibiting picketing activity that is designed to cause economic loss to building industry participants for industrial purposes. Although infrequent, this type of activity is almost entirely unique to the building and construction industry and can have a severe impact on participants in this sector.<sup>40</sup>

1.33 The statement of compatibility does not indicate the material on which the claim that the use of picketing intending to cause economic loss as a means of exerting industrial pressure is exclusive to the building and construction industry is based. No study of the nature of industrial action across different industries is

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39 For example, the CFMEU/Myer Emporium dispute in August 2012, see: Explanatory memorandum, p 2; statement of compatibility, p 58; and second reading speech, p 266. The committee is also aware of the recent allegations regarding corruption in the building industry which have been reported by the media.

40 Statement of compatibility, p 58.

referred to. Recent cases indicate that there are instances of picketing in a number of industries.<sup>41</sup>

1.34 In another example, the effect of the bills will be to subject building industry participants to higher penalties for conduct that is similar to that which is prohibited under the *Fair Work Act 2009* and subject to lower penalties under that Act. Under the Fair Work Act, the maximum civil penalty that may be imposed on an individual is 60 penalty units (\$10,200) and on a corporation the maximum is 1,000 penalty units (\$170,000). The proposed penalties under the current Bill will be 200 penalty units (\$34,000) for an individual and 1,000 penalty units (\$170,000) for a corporation.<sup>42</sup> Accordingly, in relation to actions which are prohibited under the current Bill and the Fair Work Act, building industry participants will be subject to civil penalties that are, so far as individuals are concerned, more than three times the maximum penalty that may be imposed on those who are not building industry participants.

1.35 The committee considers this issue also raises the question of whether there is an objective and reasonable justification for the differential treatment. The committee notes the comments made by the Hon Murray Wilcox QC:

There is no justification for selecting a different maximum penalty, for the same contravention, simply because the offender is in a particular industry. Of course, both the circumstances of the contravention and the offender's previous contraventions (if any) will be taken into account by the court in determining the actual penalty in the particular case; but that will be so regardless of the offender's industry.<sup>43</sup>

1.36 The Senate Scrutiny of Bills Committee noted in its report on the main bill that '[a]lthough the explanatory memorandum argues, in general terms, that higher

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41 *Davids Distribution Pty Ltd v National Union of Workers* (1999) 91 FCR 463 (picketing of grocery wholesaler and distributor); *Communications, Electrical, Energy, Information, Postal, Plumbing & Allied Services Union of Australia v Commissioner Laing of the Australian Industrial Relations Commission & Anor* (includes corrigendum dated 13 November 1998) [1998] FCA 1410 (picketing of power station premises); *Southcorp Australia Pty Limited v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union* [2000] FCA 1480 (12 October 2000) (packaging industry); *The Age Company Limited and Fairfax Print Holdings Pty Limited - re Alleged industrial action at the Spencer Street and Tullamarine sites - PR944112* [2004] AIRC 183 (26 February 2004) (newspaper industry); *Shell Refining (Australia) Pty Ltd v Australian Workers' Union* [1999] VSC 297 (13 August 1999) (petrol refining and distribution industry); *Co-operative Bulk Handling Ltd v Maritime Union of Australia* [2013] FCA 940 (2 July 2013) (stevedoring industry); *Recall Information Management Pty Ltd v National Union of Workers* [2013] FCA 161 (1 March 2013) (document storage and management industry); *Toll Transport Pty Ltd (t/a Toll Customised Solutions) v National Union of Workers & Ors* [2012] VSC 316 (25 July 2012) (wholesale distribution industry).

42 Proposed new section 81 of the main bill.

43 The Hon Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction Industry Report*, March 2009, paras 1.18.

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penalties are appropriate in the building industry context, there is no explanation of the large difference in penalties proposed by this particular clause.<sup>44</sup>

**1.37** Where the Minister maintains that differential legislative treatment of parts of the building and construction industry is based on the existence of facts or practices which are peculiar to that industry or are present to an extent not seen in other industries, the committee expects that appropriate empirical evidence of this will be included in the statement of compatibility.

**1.38** In the present case the explanatory memorandum and statement of compatibility accompanying the bill rely primarily on the 2003 report of the Royal Commission into the Building and Construction Industry and on a number of recent incidents in the industry. No data comparing the nature and incidence of unlawful behaviour in other industries has been provided to the Parliament which would permit the committee to objectively assess whether there is currently a case to be made that the building and construction industry is affected by a higher level of unlawful behaviour than other industries or suffers from unlawful behaviour that is specific to that industry.

**1.39** The committee notes that a number of laws have been adopted since 2003 to address the issues raised by the Royal Commission, the report of which is now a decade old. Neither the explanatory memorandum nor the statement of compatibility provides any empirical information as to the impact of these laws on the extent of practices which the current bills propose to prohibit.

**1.40** On the basis of the material provided, it is not clear that an objective basis for the differential treatment has been clearly demonstrated. The committee accordingly has concerns about whether the proposed legislative scheme is consistent with the right to equality and non-discrimination.

**1.41** The committee intends to write to the Minister for Employment to seek further information on the basis on which the Minister has concluded that the problems identified by the Royal Commission in its report of 2003 persist on a scale that would justify the adoption of a separate legislative regime for sectors of the building and construction industry. In particular, given that reforms similar to those proposed were adopted in 2005 and were in force until 2012, the committee seeks details of any assessment undertaken by government of the impact of those laws and subsequent laws on the practices which are addressed by the bill, as well as an analysis of the critiques made of the claims about the beneficial impact or otherwise of the legislation.

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44 Senate Scrutiny of Bills Committee, *Alert Digest No. 9 of 2013*, p 49.

**1.42 The committee also seeks empirical data comparing the nature and incidence of unlawful behaviour in other industries. This will permit the committee to objectively assess whether there is currently a case to be made that the building and construction industry is affected by a higher level of unlawful behaviour than other industries or suffers from unlawful behaviour that is specific to that industry.**

*Right to freedom of association and right to form and join trade unions*

1.43 Article 22 of the ICCPR guarantees the right to freedom of association generally, and also explicitly guarantees everyone 'the right to form trade unions for the protection of [their] interests.' Limitations on this right are only permissible where they are 'prescribed by law' and 'necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others'.<sup>45</sup> Article 22(3) provides that no limitations are permissible if they are inconsistent with the guarantees of freedom of association and the right to organise rights contained in the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87).

1.44 Article 8 of the ICESCR also guarantees the right of everyone to form trade unions and to join the trade union of his or her choice. Limitations on this right are only permissible where they are 'prescribed by law' and 'are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others'.<sup>46</sup> Article 8 also sets out the rights of trade unions, including the right to function freely subject to no limitations other than those prescribed by law and which are necessary for the purposes set out above, and the right to strike. As with article 22 of the ICCPR, article 8 provides that no limitations on the rights are permissible if they are inconsistent with the rights contained in ILO Convention No. 87.<sup>47</sup>

1.45 A number of aspects of the legislation relating to the building and construction industry adopted since 2005 have been considered by expert bodies of the International Labour Organisation (ILO), as well as by UN human rights treaty bodies.<sup>48</sup> Those bodies have raised concerns about the compatibility of certain measures with the freedom of association and right to collective bargaining guaranteed by the ILO Constitution and ILO conventions to which Australia is party.

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45 Article 22(2) of the ICCPR.

46 Article 8(1)(a) of the ICESCR.

47 Article 8(3) of the ICESCR.

48 UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the fourth periodic report of Australia*, (2009) E/C.12/AUS/CO/4, para 19.

Some of the provisions which were the subject of concern reappear in the present bill in substantially similar form.

1.46 The *Human Rights (Parliamentary Scrutiny) Act 2011* does not include the ILO Constitution or ILO conventions on freedom of association and the right to bargain collectively in the list of treaties against which the human rights compatibility of legislation is to be assessed. Nonetheless, these ILO standards and jurisprudence are relevant to the mandate of the committee as they are the practice of the international organisation with recognised and long-established expertise in the interpretation and implementation of these rights. It is a specialised body of law which can inform the general guarantees set out in the human rights treaties. In the current case, ILO Convention No. 87 is directly relevant, in that both article 22 of the ICCPR and article 8 of the ICESCR expressly state that measures which are inconsistent with the guarantees provided for in ILO Convention No. 87 will not be consistent with those rights.

1.47 The committee notes that neither the explanatory memorandum nor the statement of compatibility for this bill include any reference to ILO commentary on the issues raised by these bills, either generally or specifically in relation to Australia.

**1.48 The committee considers that it would assist its consideration of the human rights compatibility of bills if the statement of compatibility referred to the relevant practice of ILO supervisory bodies on issues raised by a bill, particularly where the bill raises issues relating to article 22 of the ICCPR and article 8 of the ICESCR and where ILO bodies have previously commented adversely on provisions which are substantially similar to those contained in a bill.**

**1.49 The committee intends to write to the Minister for Employment to request that, where a bill gives rise to issues that have been considered by ILO supervisory bodies (particularly where those bodies have made adverse comments about human rights compatibility in relation to current Australian legislation or similar provisions of previous Australian laws):**

- **the committee's attention be drawn to those views in the statement of compatibility; and**
- **the statement of compatibility include the details of the government's formal response to those views (where available) as well as the government's position on whether it agrees or not with the ILO bodies' expert assessment.**

*Right to organise and bargain collectively*

1.50 The right to organise includes the right to bargain collectively, and is thus guaranteed by articles 22 of the ICCPR and article 8 of the ICESCR. The main bill seeks to introduce a new provision providing for the unenforceability of project

agreements. It provides that certain project agreements will be unenforceable to the extent that they are made with the intention of securing standard employment conditions for building employees working on multi-employer sites. According to the statement of compatibility:

[t]he provision is intended to prevent the application of project or site-wide agreements (excluding agreements that are Commonwealth industrial agreements) to subcontractors and their employees who may already be covered by existing agreements or who may want to enter into their own agreements.<sup>49</sup>

1.51 This provision gives rise to concerns about compatibility with the right to organise and to bargain collectively. The statement of compatibility acknowledges that the provision limits the right to bargain collectively. The statement then refers to the findings of the 2003 Royal Commission, which concluded that site-wide agreements have the effect that the terms and conditions of the employment relationship between subcontractors and their employees are determined by processes in which they have not participated. According to the statement:

the measure is appropriate to Australia's collective bargaining framework in that the provision is not intended to limit, nor does it prevent, collective bargaining at the level of particular enterprises. Rather, in implementing this recommendation of the Royal Commission, this provision supports the right to bargain collectively by protecting the rights of employees to negotiate their terms and conditions of employment with their employer and by ensuring that such terms and conditions contained in enterprise agreements cannot be undermined by site-wide agreements.<sup>50</sup>

1.52 The proposed provision is substantially similar to the now repealed section 64 of the 2005 Act. The ILO Committee on Freedom of Association and the ILO Committee on the Application of Conventions and Recommendations (CEACR) have each considered section 64 of the 2005 Act. The tripartite Committee on Freedom of Association commented:

The Committee emphasizes that according to the principle of free and voluntary collective bargaining embodied in Article 4 of Convention No. 98, the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and, consequently, the level of negotiation should not be imposed by law, by decision of the administrative authority or by the case law of the administrative labour authority [see Digest, op. cit., para. 851]. ... The Committee therefore requests the Government to take the necessary steps with a view to revising section 64 of the 2005 Act so as to ensure that the determination of the bargaining level is left to the discretion of the parties and is not imposed by law, by decision

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49 Statement of compatibility, p 52.

50 Statement of compatibility, p 52.

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of the administrative authority or the case law of the administrative labour authority. The Committee requests to be kept informed in this respect.<sup>51</sup>

1.53 The independent expert ILO Committee on the Application of Conventions and Recommendations reiterated this concern in 2011, at a time when the then government indicated that it proposed to introduce into the Parliament a bill to repeal section 64 of the BCII Act, and 'expresse[d] once again the firm hope that the undertaken legislative reform in the building and construction industry will soon be completed in full conformity with the Convention.'<sup>52</sup>

1.54 The committee notes that two ILO supervisory bodies have taken the view that the predecessor provision was not consistent with the right to freedom of association and to bargain collectively. The committee also notes that the views of the ILO supervisory mechanisms in relation to Australia on this issue were not referred to in the explanatory memorandum or in the statement of compatibility.

**1.55 The committee intends to write to the Minister for Employment to seek an explanation as to how, in light of the views expressed by the ILO Committee on Freedom of Association and the ILO Committee on the Application of Conventions and Recommendations, proposed new section 59 can be viewed as consistent with the right to freedom of association and to bargain collectively guaranteed by article 8 of the ICESCR, article 21 of the ICCPR and applicable ILO conventions.**

*Right to freedom of assembly and freedom of expression*

1.56 The statement of compatibility notes that the proposed prohibition on unlawful picketing in clause 47 of the bill restricts the right to freedom of assembly.<sup>53</sup> The committee notes it would also limit freedom of expression. The committee notes the explanation provided in the statement of compatibility regarding how the measure is reasonable and proportionate to achieving a legitimate aim and has no further views on this point.

1.57 However, even if the proposed prohibition of certain types of picketing were justified as a legitimate restriction on the freedom of assembly and other relevant rights, that is not sufficient. If some groups are permitted to exercise a right to a greater extent than others, then issues of discrimination in relation to the right arise. As set out above, both the ICCPR and ICESCR guarantee the fulfilment of the rights in

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51 ILO Committee on Freedom of Association, *Case No 2326 (Australia), Report in which the committee requests to be kept informed of developments - Report No 338*, November 2005, para 448 (emphasis added).

52 Observation (CEACR) - adopted 2011, published 101st ILC session (2012 (Right to Organise and Collective Bargaining Convention, 1949 (No. 98) - Australia (Ratification: 1973)).

53 Statement of compatibility, p 58.

the respective Covenants without discrimination, which would include discrimination on the basis of status as a worker in a particular industry. The statement of compatibility does not explicitly address the issue of discrimination in the fulfilment of rights, in relation to this right or other rights.

1.58 Two aspects of the issue arise in relation to unlawful picketing. First, to the extent that the type of picketing in question is prohibited only by building industry participants (if that is the case), no justification is offered why this should be so. If the picketing causes economic loss to others, it is not clear why that protection should be provided only to those in the building industry. Conversely, it appears that the picketing in question would be covered under the Fair Work Act, so that non-building industry workers and unions would be covered. However, they would not be subject to the same information-gathering regime or to the same penalties. This also gives rise to the issue of whether there is an objective and reasonable basis for distinguishing between the building and other industries.

**1.59 The committee recognises that the restrictions on picketing pursue objectives that are legitimate, insofar as they are intended to protect the rights and interests of others. The committee considers that a case can be made that the restrictions bear a rational connection to the achievement of that objective, but that the severity of the penalties imposed may give rise to issues of proportionality.**

1.60 In addition, the committee is of the view that the provisions give rise to issue of compatibility with the right to non-discrimination in the fulfilment of rights guaranteed by article 2(1) of the ICCPR and article 2(2) of the ICECSR, insofar as they apply more severe penalties and a more stringent enforcement regime to those engaged in such activities in the building industry.

1.61 The committee intends to write to the Minister for Employment to seek clarification as to:

- how the application of the provisions relating to unlawful picketing only to building industry participants is compatible with article 2(1) of the ICCPR with respect to articles 19, 21 and 22 of the ICCPR and article 2(2) of the ICESCR with respect to article 8 of the ICECSR; and
- whether the picketing addressed by the bill would fall within prohibitions contained in the *Fair Work Act 2009* and, if so, why those provisions would not provide an adequate legislative response in relation to the building and construction industry as they do in relation to other industries.

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*Right to privacy – coercive information-gathering powers*

1.62 Proposed new chapter 7 of the main bill confers powers on the ABCC to require, by written notice (an examination notice), a person to produce information, documents or to attend before the ABC Commissioner to answer questions where 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 relevant to such an investigation.<sup>54</sup> Failure to comply with a notice constitutes a criminal offence, which carries a maximum penalty of imprisonment for six months.<sup>55</sup>

1.63 The proposed new information-gathering power is substantially similar to section 52 of the 2005 Act. The coercive investigatory powers of the 2005 Act (including section 52) and the desirability of continuing them were the subject of review by the Hon Murray Wilcox QC in his review of the 2005 Act. Mr Wilcox took the view that, notwithstanding the considerable criticism that these coercive powers had received, it was appropriate to continue to make these powers available to the regulator for a further period, subject to a sunset clause.<sup>56</sup> However, he considered it essential to include a number of safeguards in relation to the exercise of those powers.<sup>57</sup>

1.64 As a result, the current provisions in the 2012 Act provide for a two-stage process for the exercise of the power. Where the Director of the Fair Work Building Inspectorate believes on reasonable grounds that a person has information or documents, or is capable of giving evidence, that is relevant to an investigation, the Director may apply to a nominated AAT presidential member for the issue of an examination notice. Such an application must include certain information so as to enable the presidential AAT member to assess, among other matters, the necessity of issuing the notice. The AAT member must be satisfied, for example, that there are reasonable grounds to believe that the person has information, documents or evidence, or is capable of giving evidence, relevant to the investigation, that any other method of obtaining the information, documents or evidence (i) has been

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54 Proposed new section 61 of the main bill. A 'designated building law' is defined in section 5 as the *Independent Contractors Act 2006*, the *Fair Work Act 2009*, *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, or a Commonwealth industrial instrument.

55 Proposed new section 62 of the main bill.

56 The Hon Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction Industry Report*, March 2009, paras 1.24-1.26.

57 Wilcox, *Transition to Fair Work Australia for the Building and Construction Industry Report*, pp 6-7, Recommendations 3 and 4.

attempted and has been unsuccessful; or (ii) is not appropriate, and that the information, documents or evidence would be likely to be of assistance in the investigation.

1.65 The 2012 Act also requires notification of the issue of an examination notice, and the provision of a copy of the notice and supporting documentation to the Commonwealth Ombudsman.<sup>58</sup> It also requires the Ombudsman to review the exercise of the examination powers and to provide an annual report to Parliament about examinations conducted during the year, as well as any other reports about the results of reviews into the exercise of the examination powers that the Ombudsman considers appropriate.<sup>59</sup>

1.66 The FWBC reported in 2013 that in the year 2012-2013 it had successfully applied for the issue of two examination notices as part of one investigation (which was continuing as of 30 June 2013), and that it had not applied for the issue of any other examination notices during that period. FWBC did not conduct any examinations under section 45 of the FWBI Act during the reporting period.<sup>60</sup> In 2013 the Commonwealth Ombudsman reported on one examination.<sup>61</sup>

1.67 This bill proposes to continue some, but not all, of the additional protections that form part of the existing coercive information gathering powers under the 2012 Act.

1.68 These powers and associated provisions give rise to significant human rights concerns because of their breadth, the deployment of coercive powers in relation to civil wrongdoing rather than serious criminal offences, their application only to one part of the workforce, the limited procedural safeguards restricting and monitoring their use, the abrogation of the right of persons not to incriminate themselves, and the significant maximum penalty available for a failure to cooperate.

1.69 The right to privacy prohibits arbitrary or unlawful interference with a person's privacy, family, home or correspondence. Limitations must seek to achieve a legitimate objective, bear a rational connection between the limitation and the objective and be proportionate to the objective.

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58 *Fair Work (Building Industry) Act 2012*, section 47.

59 *Fair Work (Building Industry) Act 2012*, section 54A.

60 Fair Work Building and Construction, *Annual Report 2012-13*, p 36.

61 Commonwealth Ombudsman, *Annual report by the Commonwealth Ombudsman: review conducted under Division 3 of the Fair Work (Building Industry) Act 2012*, November 2013 (report on one examination carried out on 18 June 2012 with full documentation provided to the Ombudsman in July 2012).

### *Legitimate objective*

1.70 The statement of compatibility justifies the inclusion of the provision by reference to recommendations arising out of the 2003 Royal Commission, which recommended that the ABCC should be given the same coercive powers as those possessed by the Australian Competition and Consumer Commission under the *Trade Practices Act 1974*.<sup>62</sup> According to the Royal Commissioner, the ABCC would need this power 'to penetrate the veil of silence behind which many decisions to take unlawful industrial action are hidden. Those who will be best placed to give information concerning breaches of the civil law will often, even usually, be complicit in those breaches.'<sup>63</sup>

1.71 Accordingly, it appears to the committee that, on the basis of the explanatory materials, the powers are deemed as necessary to enable information gathering that will lead to the identification of persons engaged in unlawful industrial action. Further, due to the prevalence of such conduct in the building and construction industry, such powers are deemed to be necessary to bring about greater harmony in the industry and higher levels of productivity.

**1.72 The committee considers that the goal of seeking to ensure that participants in an industry observe the workplace relations laws that apply to that industry (assuming the substance of those laws are otherwise consistent with human rights including freedom of association and the right to bargain collectively) is a legitimate objective within the meaning of the ICCPR and ICESCR.**

### *Rational connection*

1.73 Assertions that a measure will contribute to the achievement of the objective are not sufficient to discharge the onus of demonstrating there is a rational connection where the matter is capable of evaluation in light of empirical evidence. While it may be difficult to predict the impact of particular legislative provisions, there is some experience under the similar provisions of the 2005 Act and the 2012 Act, as well as discussion in the industrial relations literature which assesses the relative impact of coercive power regimes and more collaborative regimes.<sup>64</sup> However, the statement of compatibility contains no reference to the experience under these statutory regimes of the use of the powers or any assessment of

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62 Sections 155 and 156 of the *Trade Practices Act 1974*, now section 155 of the *Competition and Consumer Act 2010*.

63 Statement of compatibility, pp 62-63.

64 See C Allan, A Dungan and D Peetz, D, "'Anomalies", Damned "Anomalies" and Statistics: Construction Industry Productivity in Australia' (2010) 52(1) *Journal of Industrial Relations* 61, 63-64 and sources cited there.

whether they have had any significant impact in the achievement of the similar goals set out under the earlier legislation.

**1.74 The committee considers that, on the basis of the material provided in the explanatory memorandum and statement of compatibility, it has not at this stage been clearly demonstrated that there is a rational connection between the conferral of coercive information-gathering powers on the ABCC and the achievement of the stated goals.**

*Reasonable and proportionate measure*

1.75 The statement of compatibility merely reasserts the continuing need for these powers by referring to the report of the Royal Commission and points to the procedural requirements that must be followed and to the review of such examinations by the Commonwealth Ombudsman. It concludes on the basis of these factors that the restriction on the right to privacy involved is not arbitrary.

1.76 The committee considers there are a range of other factors which need to be addressed in order to assess whether the powers are reasonable and proportionate. These include:

- the fact that the coercive information-gathering powers relate to investigations of civil wrongdoing, not of suspected criminal conduct;
- the fact that only participants in the building and construction industry are subject to this legislative regime, while other workers and employers are subject to legislation with a less stringent enforcement mechanism;
- the relative level of penalties imposed under this legislative regime both in relation to the substantive civil penalty violations and for failure to comply with an examination notice, compared with violations under the Fair Work Act;<sup>65</sup>
- the fact that much, if not all, of the prohibited industrial action covered by the bills could be viewed as falling within prohibited conduct under the Fair Work Act;
- the removal of the privilege against self-incrimination (albeit with the provision of use and derivative use immunity);
- the limited safeguards that apply prior to the issue of an examination notice; and

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65 The statement of compatibility (p 58) asserts, without further, 'the need for higher penalties to apply'.

- any significant improvement in the conditions the Royal Commission found existed in the building industry in light of the findings in the Wilcox report that there had been some progress in the period 2005 to 2009.

1.77 Of particular importance in this regard is the issue of whether there are adequate safeguards against abuse provided for under the legislation. Of relevance are the recommendations of the Wilcox inquiry about the need for further safeguards on the exercise of section 52 of the 2005 Act, which corresponds in many respects to proposed section 61 of the main bill.<sup>66</sup>

1.78 Part 2 of Chapter 7 of the bill contains none of the safeguards which the Wilcox review recommended should apply *prior* to the issue of an examination notice and which were adopted in the FWBI Act. In relation to the procedures to be adopted after the issue of an examination notice, the bill provides for a person to be represented by a lawyer when attending before the ABC Commissioner.<sup>67</sup> It also requires the ABC Commissioner to notify the Commonwealth Ombudsman of the issue of an examination notice and relevant documentation (including a report, a video recording and transcript of the examination<sup>68</sup>) and requires the Ombudsman to review the exercise of powers under Part 2 of Chapter 7 and to provide an annual report to Parliament about examinations conducted during the year, as well as any other reports about the results of reviews into the exercise of the examination powers that the Ombudsman considers appropriate.<sup>69</sup>

1.79 Further, as noted above, even if these provisions are considered to be compatible with the right to privacy, if some groups are permitted to exercise a right to a greater extent than others, then issues of discrimination arise. The issue arises

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66 The committee also notes that the coercive information gathering powers under the 2005 Act were criticised by the ILO Committee on Freedom of Association for the breadth of the powers conferred and the absence of adequate safeguards. See Committee on Freedom of Association, *Case No 2326 (Australia), Report in which the committee requests to be kept informed of development - Report No 338*, November 2005, paras 454-456; *Case No 2326 (Australia), Effect given to the recommendations of the committee and the Governing Body - Report No 353*, March 2009, paras 21-24. The Australian government indicated to the ILO 'the retention of these powers is balanced by the introduction of significant new safeguards, including a sunset provision three years after they come into effect'. *Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), General Report and observations concerning particular countries*, International Labour Conference, 102<sup>nd</sup> Session, 2013, p 537 (in the context of the Labour Inspection Convention, 1947 (No 81).

67 Proposed new section 61(4).

68 Proposed new section 65(2).

69 Proposed new section 65 (3), (6) and (7).

here insofar as building industry participants are subject to a regime of civil penalty provisions with higher penalties than apply under the generic provisions of the Fair Work Act, and are subject to a more stringent investigation and enforcement regime. To the extent that two different groups of workers or employers are subject to different penalties and procedures for substantially similar violations of industrial law, the question arises whether there is an objective and reasonable basis for distinguishing between building industry participants and others. The statement of compatibility does not explicitly address the issue of discrimination in relation to the right to privacy.

**1.80** The committee notes that the power under proposed section 61 to compel attendance and the production of information and documents is unusual in the context of industrial relations laws in Australia, involves a significant encroachment on the right to privacy and needs to be clearly justified. As presently drafted, the provision raises human rights compatibility concerns.

**1.81** The committee notes that neither the explanatory memorandum nor the statement of compatibility provides any information about the extent of the use of similar powers under the previous and existing laws, for the purpose of assessing whether they have been necessary for the achievement of the purposes of that legislation and whether there have been any instances of misuse of the powers.

**1.82** The committee does not consider that the material provided clearly establishes that this is a reasonable and proportionate measure. The committee considers that, if the power to issue compulsory examination notices is to be retained, additional safeguards are required. The committee is concerned that the safeguards which were recommended by the Wilcox review and which were included in the 2012 Act have not been included in this bill.

**1.83** The committee is of the view that, in any event, the provisions give rise to issues of compatibility with the right to non-discrimination guaranteed by article 2(1) of the ICCPR in conjunction with article 17 of the ICCPR, and article 2(2) of the ICESCR in conjunction with article 8 of the ICESCR, insofar as they apply heightened penalties and a more stringent enforcement regime to building industry participants than is applied to those who are not building industry participants for substantially the same industrial conduct.

**1.84** The committee intends to write to the Minister to:

- seek clarification as to why the application of a more stringent enforcement regime to building industry participants than is applied to those who are not building industry participants for substantially the same industrial conduct should not be considered discriminatory and incompatible with article 2(1) of the ICCPR in conjunction with article 17

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of the ICCPR, and article 2(2) of the ICECSR in conjunction with article 8 of the ICECSR; and

- to recommend that, if the coercive investigative power is to be retained, Part 2 of Chapter 7 of the bill be amended so that the power to issue an examination notice does not lie within the sole discretion of the ABC Commissioner, but should be subject to independent review including the type of safeguards which were recommend by the Wilcox review and included in the FWBI Act.

*Right to privacy – disclosure of information*

1.85 Proposed new section 61(7) of the main bill provides that the power of the ABCC to compel the disclosure of information or documents is ‘not limited by any provision of any other law that prohibits the disclosure of information (whether the provision is enacted before or after the commencement of this section, except to the extent that the provision expressly excludes the operation of this section.’ This provision is similar in scope to old section 52(7) of the 2005 Act and to section 57 of the 2012 Act.

1.86 The Wilcox inquiry described the substantially similar provision in section 52(7) of the 2005 Act as ‘an extraordinary override provision’.<sup>70</sup> The committee considers that the provision appears to subordinate all previous legislative decisions about the protection of confidential personal information to the policy embodied in this particular piece of legislation which relates to the regulation of one sector of the economy. Simply to provide, as clause 61(7) does, that information the disclosure of which is protected under one law may be disclosed for the purpose of another law gives rise to concerns about the compatibility of the provision with the right to privacy guaranteed by article 17 of the ICCPR.

1.87 Previous non-disclosure or secrecy provisions reflect legislative decisions that seeks to ensure that the intrusion on personal privacy necessary for achieving the legislative purpose is not excessively broad. This is achieved by providing that information obtained through the use of coercive information-gathering powers may be disclosed only to those involved in the administration of the law in question or for the purposes of related legislation.

1.88 *Legitimate objective:* Neither the explanatory memorandum nor the statement of compatibility address this issue. However, the objective being pursued by the provision is to ensure that information that is relevant to the implementation of the legislation is available to the regulator. This would appear to be a legitimate

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70 The Hon Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction Industry Report*, March 2009, p 31.

objective, to the extent that the substantive provisions being implemented are otherwise consistent with human rights.

1.89 *Rational connection*: The measure is arguably rationally connected to the achievement of the objective suggested above.

1.90 *Proportionality*: The statement of compatibility does not address the issue of whether the measure is a reasonable and proportionate measure in pursuit of the objective. Given that the clause proposes to disapply, for the purposes of this legislation, all existing non-disclosure provisions in Commonwealth law, without regard to the balance that may have been struck between privacy interests and other interests in particular circumstances, the provision appears disproportionate.

**1.91 The committee considers that the limitations on the right to privacy proposed by clause 61(7) have not been demonstrated to be a proportionate measure.**

1.92 Proposed new section 105 of the main bill allows for the disclosure of information acquired by a wide range of persons in the performance of a wide range of functions or powers. Such information may be disclosed by the ABC Commissioner or Federal Safety Commissioner where the Commissioner reasonably believes that it is necessary or appropriate to do so for the performance of the Commissioner's functions or the exercise of the Commissioner's power, or if the Commissioner reasonably believes that the disclosure is likely to assist in the administration or enforcement of a law of the Commonwealth, a State or a Territory.

1.93 There is no limitation specified as to the nature of the law of the Commonwealth, State or Territory, the administration or enforcement of which may be assisted by such disclosure.

1.94 As the information that may be acquired by eleven different persons or categories of persons specified under proposed new section 105(1) includes personal information protected by article 17 of the ICCPR, the broadly defined power to disseminate the information gives rise to compatibility issues. There is no suggestion that it may be disseminated only in relation to laws relating to the regulation of the building industry or that a broader dissemination is justifiable.

1.95 The explanatory memorandum and the statement of compatibility provide a summary of the provisions but do not provide any further information.<sup>71</sup>

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71 Statement of compatibility, pp 64-65.

**1.96 The committee considers that the limitations on the right to privacy proposed by section 105 have not been demonstrated to be a proportionate measure.**

*Right to privacy – powers of entry into premises*

1.97 Proposed new section 72 of the main bill confers on authorised officers powers to enter both business and residential premises for various compliance purposes. Proposed new section 74 authorises the exercise of a wide range of powers on those premises after entry. While forced entry is not permitted, the provisions authorise entry regardless of whether consent is given. There is no requirement for a warrant to be sought.

1.98 The provisions give rise to a number of human rights concerns, including whether the power can be justified as necessary and whether there are adequate safeguards against abuse, both prior to the exercise of the powers and subsequently. The statement of compatibility provides little other than description and general justification of the provisions.

1.99 The committee notes that the Senate Scrutiny of Bills Committee has raised concerns about these provisions and has noted that ‘the explanatory material do not contain a compelling justification of departure from the general principle ... that authorised entry to premises be founded upon consent or a warrant.’<sup>72</sup> The Scrutiny of Bills Committee has sought from the Minister justification for the approach adopted and also advice as to whether appropriate safeguards were considered (including the requirement of senior executive authorisation and the adoption of guidelines for the exercise of the powers).<sup>73</sup>

**1.100 The committee considers that the powers of entry and related powers raise issues of compatibility with the right to privacy guaranteed by article 17 of the ICCPR.**

**1.101 The committee intends to write to the Minister to seek further information about the lack of requirements of consent or warrant and why procedural safeguards for the exercise of such powers have not been included.**

*Right to a fair hearing – imposition of a burden of proof on the defendant*

1.102 Proposed new section 57 of the main bill provides for a reverse onus of proof in applications to a court in relation to a contravention of the prohibition of unlawful picketing (proposed new section 47) or in relation to any other civil remedy provision

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72 Senate Scrutiny of Bills Committee, *Alert Digest No 9 of 2013*, p 14.

73 Senate Scrutiny of Bills Committee, *Alert Digest No 9 of 2013*, p 14.

in Chapter 6 of the bill. The provision provides that in such actions (other than proceedings for an interim injunction), where ‘it is alleged that a person took, or is taking, action for a particular reason or with a particular intent’ and ‘taking that action with that intent would constitute a contravention of the section or provision’,

it is presumed in proceedings arising for the application, that the action was, or is being taken for that reason or with that intent, unless the person proves otherwise.<sup>74</sup>

1.103 As the statement of compatibility acknowledges, the effect of the provision is to require the defendant in such proceedings to discharge a legal burden, that is to prove on the balance of probabilities that he or she did not take the action in question for that reason or with that intent (including that if the person took the action for a number of reasons, that none of the reasons were one of the prohibited reasons).<sup>75</sup> The statement of compatibility refers to the similar provision in section 361 of the Fair Work Act.<sup>76</sup>

1.104 The imposition of a burden of proof on a defendant, even in civil proceedings, engages the right to a fair hearing under article 14(1) of the ICCPR. The imposition of a burden, and the nature of that burden (whether a legal burden or an evidential burden), must be justified as reasonable in the context of the right to a fair hearing, which guarantees equality of arms and respect for the principle of adversary proceedings. As a starting point, normally a person who wishes to rely on a particular fact in civil proceedings would be expected to bear the onus of proof in relation to that matter. In the present case, all that appears to be required is proof that certain actions have been taken, accompanied by an allegation by the plaintiff that the motivation for the actions was a prohibited one (whether or not that is an inference that might be reasonably drawn from the fact of the actions).

1.105 The effect of the provision is that a defendant is required to prove, on the balance of probabilities, a negative fact, namely that the defendant’s actions were not motivated in part or whole by a prohibited motive. This will normally be done by the defendant seeking to demonstrate the reason for his or her actions.

1.106 The statement of compatibility justifies the reverse onus provision on the ground that it would be difficult, if not impossible, for a complainant to establish a person's intent because the reasons for the person's action are peculiarly within their knowledge. Further:

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74 Proposed new section 57(1).

75 Statement of compatibility, pp 55-56.

76 Similar provision is also made by section 783 of the *Fair Work Act 2009* in relation to the prohibitions on termination of employment on certain grounds contained in section 772 of that Act.

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[t]his presumption can be rebutted by the person on the basis that their conduct was motivated by another purpose. Whether the alternative motivation is accepted by the court will be determined on the balance of probabilities. It is therefore submitted that these restrictions are reasonable in the circumstances and are proportional, legitimate and necessary.<sup>77</sup>

1.107 The Senate Committee for the Scrutiny of Bills commented in relation to this provision:

Although it may be accepted that a person's intent is a matter peculiarly known to the person, intentions and motivations (whether lawful or unlawful) may be difficult to prove as they will not necessarily be reflected in objective evidence. That is, although peculiarly within a person's knowledge, matters of intention may nonetheless remain difficult to prove. In this respect it is noted that the explanatory materials do not indicate why, in practice, it is considered that a person will, in this context, be able to produce evidence of a lawful intention. **As such the committee seeks the Minister's further advice as to the justification for, and fairness of, the proposed approach.**<sup>78</sup>

**1.108 The committee shares the concerns of the Scrutiny of Bills Committee. The committee further notes that the statement of compatibility refers to the existence of similar provisions in the Fair Work Act, but provides no information on the operation of those provisions in practice. Such information would be of assistance to the committee in determining whether provisions similar to clause 57 have operated fairly in practice.**

**1.109 The committee intends to write to the Minister for Employment to seek further information about the practical operation of existing provisions in the *Fair Work Act 2009* that are similar to the proposed new section 57 (in particular sections 361 and 783) and in particular whether any difficulties have arisen for defendants on whom a legal burden has been placed that have affected their right to a fair hearing under article 14(1) of the ICCPR.**

*Prohibition against self-incrimination*

1.110 Proposed new section 102(1) of the main bill provides that a person is not excused from providing information or documents in response to certain requests for that information or material, on the ground that to do so would contravene any other law or might tend to incriminate the person or otherwise expose the person to a penalty or other liability. These are:

- an examination notice issued under proposed new section 61
- a request made under proposed new section 74(1)(d) by an authorised Federal Safety Officer or inspector who has entered premises; or

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77 Statement of compatibility, p 56.

78 Senate Scrutiny of Bills Committee, *Alert Digest No 9 of 2013*, p 10 (emphasis in original).

- a notice under proposed new section 77(1) issued by an authorised officer to produce a record of document.

1.111 Proposed section 102(2) provides for use and derivative use immunity in relation to information or documents provided pursuant to an examination notice under proposed section 61. This protection applies to all proceedings (other than the common exceptions related to the failure to comply with an examination notice, provision of false information and the obstruction of Commonwealth officials). Proposed section 102(3) also provides for use and derivative use immunity in relation to information or documents provided under proposed sections 74(1)(d) and 77(1), but only in relation to criminal proceedings (other than the common exceptions mentioned above).

1.112 The statement of compatibility relies on the recommendation of the 2003 Royal Commission that the right of a person to refuse to comply on the basis that to do so might tend to incriminate the person be removed, subject to the provision of use and derivative use immunity in both criminal and civil matters. The statement of compatibility contains no information about the use of these powers under the previous or current laws that might provide the basis for an assessment of whether the removal of the protection is necessary.

1.113 The committee notes that clear justification must be provided for the abrogation of the right not to incriminate oneself, even where use and derivative use immunity is provided. The protection afforded by the provision of use and derivative use immunity does not constitute the full protection provided for by the privilege against self-incrimination. The committee considers the approach adopted by the Senate Standing Committee for the Scrutiny of Bills to be helpful in assessing whether the abrogation of the protection is permissible from a human rights perspective.<sup>79</sup> The committee notes that the Senate Scrutiny of Bills Committee has sought from the Minister for Employment ‘a fuller explanation of the public interest and why the abrogation of the privilege is considered absolutely necessary.’<sup>80</sup>

**1.114 The committee intends to write to the Minister for Employment to seek further information about the use that has been made of the compulsory evidence gathering powers under the 2005 Act and the *Fair Work Act 2009*, as well as further**

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79 ‘The committee does not, therefore, see the privilege against self-incrimination as absolute. In considering whether to accept legislation that includes a provision affecting this privilege the committee must be convinced that the public benefit sought will decisively outweigh the resultant harm to the maintenance of civil rights.’ Senate Standing Committee for the Scrutiny of Bills, *The work of the committee during the 42nd Parliament February 2008 – June 2010* (2013), para 2.6.

80 Senate Scrutiny of Bills Committee, *Alert Digest No 9 of 2013*, p 17.

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**explanation of how, in light of that experience and the passage of over a decade since the Royal Commission report, the abrogation of the privilege is justifiable.**

*Civil penalty provisions*

1.115 Part 2 of Chapter 8 of the main bill sets out the pecuniary penalties that may be imposed for violations of the civil penalty provisions in the bill, as well as the procedures that are to be followed. As noted above, the maximum pecuniary penalty that may be imposed on individuals for Grade A civil penalty violations is 200 penalty units (\$34,000).<sup>81</sup>

1.116 Although the penalties are described as ‘civil’ under domestic law, for the purposes of human rights law, they may under certain circumstances be considered ‘criminal’, and attract the protections applying to criminal charges and criminal proceedings in the ICCPR.

1.117 The statement of compatibility addresses in some detail the question of whether the civil penalty provision should be characterised as ‘criminal’ for the purposes of human rights compatibility analysis.<sup>82</sup> Taking into account the committee’s Interim Practice Note 2 on civil penalties, the statement of compatibility considers the classification of the penalty under Australian law, the nature of the penalties (which it argues are regulatory in nature), and the severity of the penalty.

1.118 The committee notes that proposed new section 81 of the main bill specifies separately the power of a court to impose a pecuniary penalty on a defendant and an order to pay compensation to a person for damage suffered by the person as a result of the contravention of a civil penalty provision. The pecuniary penalty, which may be sought by the regulator and any other person with an interest, may be ordered to be paid to the Commonwealth or some other person if the court so directs. This may suggest that the pecuniary penalty order is not compensatory and may provide a basis on which the provision should be characterised as criminal.

1.119 The committee also has concerns about the severity of the penalties that may be imposed on individuals of up to \$34,000 (200 penalty units). The severity of a penalty may in itself be sufficient to justify the characterisation of a provision as ‘criminal’. The statement of compatibility addresses the issue as follows:

One of the primary drivers behind industry specific legislation for the building and construction industry is the need for higher penalties to apply. Despite this, the Courts act independently in determining the appropriate penalty to apply within the limits set out in

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81 Proposed new section 81(2).

82 Statement of compatibility, pp 36-38.

the legislation and are informed by considerations of proportionality. While the Courts will have the ability to apply high penalties, this will only be applied to the most severe cases.<sup>83</sup>

1.120 This does not provide any basis on which to assess the severity of the penalty, and the committee considers that the sum that may be imposed by way of a pecuniary penalty on an individual may be sufficiently large so as to constitute a criminal penalty.

**1.121 The committee considers that the pecuniary penalty for Grade A civil penalty violations, which carries a maximum penalty of \$34,000 (or 200 penalty units) for an individual, might reasonably be characterised as criminal for the purposes of human rights law. As a result, proceedings for their enforcement would be required to comply with the guarantees that apply to criminal proceedings under articles 14 and 15 of the ICCPR, including the right to be presumed innocent, the right not to be tried or punished twice for the same offence and the right to the privilege against self-incrimination.**

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83 Statement of compatibility, p 58.