

LABOR SENATORS' DISSENTING REPORT

Introduction

1.1 Labor Senators do not see merit in these bills and oppose both in their entirety without amendment.

1.2 The short period of time given for submissions to this particular inquiry of the committee, which proposes significant changes to the law and to the rights of workers in Australia, was not appropriate and did not allow reasonable time for submissions or appropriate consideration by the committee. The urgency to re-enact the Australian Building and Construction Committee is not based on genuine requirement for urgent workplace reform, but on political motivation following the change of government. Labor senators feel strongly that the bills are being rushed unnecessarily through the Parliament.

Specific laws targeting any one industry are unnecessary

1.3 Special laws that target the building and construction industry are politically motivated, and unnecessary. Workers in the Australian building and construction industry should be subject to the same industrial laws as all other Australian workers. We reject both the majority view of the Committee and the Cole Royal Commission's finding that the building and construction industry is special or 'singular' in nature.

1.4 The Fair Work Building Industry Inspectorate has a full suite of appropriate investigative and prosecution powers to deal with any unlawful behaviour in the building and construction industry — whether by employers, employees, unions or contractors. The existing *Fair Work (Building Industry) Act 2012* (Cth) is a secure, fair and adequate regulator of industrial relations in Australia that:

- Provides enforcement that is based on education rather than prosecution;
- Retains common law rights of workers; and
- Provides for a genuinely independent compliance unit.

The Fair Work Act 2009 already regulates rights and restrictions of protected industrial action. The rate of disputation has not increased since the ABCC was abolished

1.5 The *Fair Work Act 2009* (Cth) already comprehensively regulates rights and restrictions of protected industrial action. Any additional rules are unnecessary and unjustifiable. This is especially in light of Australian Bureau of the Statistics (ABS) evidence (below) showing the rate of industrial disputation in the industry remains extremely low relative to its historic levels, and that there is no demonstrable evidence that the rate of disputation in the industry has materially increased in the period since the ABCC was abolished.¹

1 Figure 1: Construction industry industrial disputes, ABS 6321.0.55.001.

1.6 During the ABCC's operation, there was an average of 9.5 working days lost to disputes per 1000 employees per quarter in the construction industry. In the four quarters after the abolition of the ABCC, the rate of disputation in the industry has been below the ABCC-era average twice (in December 2012 and June 2013) and above it twice (in September 2012 and March 2013), as the graph below demonstrates.²

1.7 Labor Senators express concern that the employer groups, in particular the Master Builders' Association (MBA) submitted supplementary information in opposition to their support of the bills and the reintroduction of the ABCC. For example, paragraph 7.2 of the Master Builder's supplementary submission confirms agreement that in the industry there are now fewer strikes, yet paragraph 7.4 of the same document states that:

Master Builders notes that unlawful industrial action occurs almost daily in some States and Territories.³

1.8 The evidence presented then lists 16 counts of alleged industrial action across two states, between 9 July 2013 and 30 October 2013. Although no party has been allowed the time or resources to adequately assess every alleged industrial action (threat or demonstration) over the period since the ABCC was abolished, to note that this action is daily is certainly inaccurate, and if this is indeed the case, it is in direct conflict that the MBA supports the argument that the reintroduction of the ABCC would result in reduced industrial disputes, when they agree that there are now fewer strikes since it was dissolved.

1.9 To proactively legislate against ILO conventions is unacceptable action by the Australian Parliament. The former BCII Act, upon which this bill is based, was found to constitute a serious breach of Australia's international obligations by the United Nations' International Labour Organisation (ILO) under:

2 Australian Council of Trade Unions, *Submission 6*, p. 21.

3 Master Builders Australia, *Answers to questions taken on notice*, 26 November 2013 (received 27 November 2013), p. 8.

- *The Labour Inspection Convention 1947 (no. 81)*
- *The Freedom of Association and Protection of the Right to Organise Convention 1947 (no.87); and*
- *The Right to Organise and Collective Bargaining Convention 1949 (no. 98).*

Coercive powers available to the ABCC under these bills are excessive

1.10 The Building and Construction Industry (Consequential And Transitional Provisions) Bill 2013 gives the ABCC new investigative powers which may be applied to conduct occurring, or investigations begun, prior to the new Act taking effect.

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

1.12 During the hearing, witnesses demonstrated that there was sufficient agreement that the bills required modification to protect the freedom of association and right to silence. For example, Mr Daniel Mammone, Director of Workplace Policy and Legal Affairs, Australian Chamber of Commerce and Industry, responded to questioning in the follow terms:

Senator CAMERON: Do you—ACCI—believe in freedom of association?

Mr Mammone: Yes. I can adamantly say, with my hand on my heart, on behalf of ACCI that we believe in freedom of association and the principles of freedom of association.

Senator CAMERON: Privilege against self-incrimination?

Mr Mammone: Yes, those presumptions; yes, we generally support those.

Senator CAMERON: And the right to silence?

Mr Mammone: Yes, we generally support those presumptions.

Senator CAMERON: So you generally support those presumptions but you support their being suppressed under this proposed legislation?

Mr Mammone: Our submission goes to the detail of what we support in terms of the bill. Those general norms you have just outlined are not absolute. They can in some circumstances need to be modified to address the particular policy issues. We generally do support those fundamental legal norms but in some cases we support legislation which modifies the application of those.⁴

4 Mr Daniel Mammone, *Proof Committee Hansard*, 26 November 2013, p. 33.

1.13 The ACTU's response to questions taken on notice during the hearing is also relevant.⁵ Coalition Senators agree that the comparison of the coercive information gathering powers vested in the Australian Competition and Consumer Commission and the Australian Securities and Investment Commission — two statutory agencies to which parallels were drawn in several of the employer submissions to this inquiry — do not apply to the industrial jurisdiction which is concerned with, and regulates, the relationship between employers, employees and unions. Serious breaches of securities and competition law (for example price-fixing and fraud) are by definition secretive and conspiratorial processes where evidence is difficult to obtain. By contrast a strike, for example, is by its very nature a public event that is independently witnessed. Coercive information-gathering powers in this context are both excessive and unnecessary.

Extending the powers of the ABCC outside of the building and construction industry proper applies an extra, unnecessary level of legislation

1.14 The bill proposes to extend the reach of the ABCC into picketing, offshore construction and the transport and supply of goods to building sites. This expansion encompasses the transport or supply of goods to building sites, including resource platforms, extending the definition of building work and the powers of the ABCC more widely than previous legislation, including the 2005 legislation that initially established the ABCC. This proposal would subject industries beyond the building and construction industry to unnecessary legislation and judicial complication, which could in theory lead to disengagement of the logistics industry from the building and construction industry proper.

The ABCC has no power in criminal matters, and there is no evidence organised crime exists in the building and construction industry

1.15 Public debate has suggested that these laws will quell organised criminal activity in the industry. However, this argument is misplaced as the ABCC has no power in relation to criminal matters and the argument that it can address that issue is deliberately misleading.

The bills will not improve productivity

1.16 Supporters of the bill claim that that passage of the bill will improve productivity. Submissions demonstrated that the data from Independent Economics (formally trading as EconTech) relied upon by the Department and the majority of the Committee is inherently flawed.⁶

5 Australian Council of Trade Unions, *Response to questions taken on notice*, 26 November 2013 (received 29 November 2013).

6 See for example: Australian Council of Trade Unions, *Submission 6*; Australian Council of Trade Unions, *Response to question taken on notice*, 26 November 2013 (received 28 November 2013); Construction, Forestry, Mining and Energy, *Submission 7*; Professor David Peetz, *Submission 2*.

1.17 The alleged 9.4% improvement in construction industry productivity that Mr Harnisch, Master Builders Australia, attributed to the ABCC in both submissions and his appearance before the Committee is not a finding of the 2013 Independent Economics report. This is a modelling assumption only drawn from estimates of the preceding reports, and not a finding. Significantly, the report states that:

... in line with earlier reports, for modelling purposes we conservatively assume a smaller gain of 9.4 per cent.⁷

1.18 Neither was it a finding of the 2010 report:

...the most recent data indicates that, on balance, the modelling assumption made in the Previous Reports remain reasonable. That is, the ABCC and related industrial relations reforms have added in the vicinity of 9.4 per cent to labour productivity in the construction industry. Hence, consistent with the Previous Reports, this report bases its modelling of economy-wide impacts on a gain in construction industry labour productivity of 9.4 per cent.⁸

1.19 Further, it was not a finding of the 2008 report:

...on balance it is reasonable to conclude the latest evidence indicates that the ABCC and related industrial relations reforms have added about 10 per cent to labour productivity in the construction industry. This is consistent with the 2007 EconTech Report, which used a gain of 9.4 per cent. Hence this report also assumes an ABCC-related gain in construction industry labour productivity of 9.4 per cent for the purposes of economy-wide modelling.⁹

1.20 Relying on a continuing modelling estimate and representing this as evidence as demonstrating the ‘successes’ of the ABCC is neither accurate nor appropriate. The credibility of the 2007 EconTech report has been demolished by the respected academic Professor David Peetz.¹⁰ Further, the Hon. Murray Wilcox QC described the 2007 report as "deeply flawed" and concluded that "it ought to be totally disregarded."¹¹ It is from this discredited report that the 9.4 per cent figure of lost productivity is derived. It should not be relied upon by the Committee.

7 Independent Economics, *Economic Analysis of Building and Construction Industry Productivity: 2013 Update*, 26 August 2013, p. 28.

8 Independent Economics, *Economic Analysis of Building and Construction Industry Productivity*, 2010, p. 23.

9 EconTech, *Economic Analysis of Building and Construction Industry Productivity*, 2008, pp iii—iv.

10 Professor David Peetz, *Submission 2*.

11 Wilcox, M., *Transition to Fair Work Australia for the Building and Construction Industry, Report to Minister for Employment and Workplace Relations*, 31 March 2009, p. 46.

1.21 The proposition that the bills would enhance productivity in the building and construction industry is highly objectionable given the evidence.

Conclusion

1.22 The legislation proposed by the bills is excessive, discriminatory, unnecessary and unjustifiable. The policy arguments in support of the bills are based on discredited analysis and faulty assumptions. For these reasons Labor Senators do not see merit in either the Building and Construction Industry (Improving Productivity) Bill 2013 or the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 and oppose both in their entirety.

Recommendation 1

1.23 Labor senators strongly recommend that the bills be rejected.

**Senator Sue Lines
Deputy Chair**