

# CHAPTER 1

## Background to the Inquiry

### Reference

On 4 December 2013 the Senate referred the Government's approach to re-establishing the Australian Building and Construction Commission for inquiry and report by the last sitting day in March 2014 (27 March 2014). The committee agreed that submissions should be received by 10 February 2014. The terms of reference for the inquiry are:

The Government's approach to re-establishing the Australian Building and Construction Commission through the Building and Construction Industry (Improving Productivity) Bill 2013 and related bills, with particular reference to:

- a. the potential impact of the re-establishment of the Australian Building and Construction Commission on the building and construction industry;
- b. the need or otherwise for a specialist industrial regulator in the building and construction industry;
- c. the potential impact of the bills on productivity in the building and construction industry;
- d. whether the bills are consistent with Australia's obligations under international law;
- e. the potential impact of the bills on employees, employers, employer bodies, trade and labour councils, unions and union members;
- f. the extreme and heavy-handed proposed powers of the Australian Building and Construction Commission, including coercive powers, conduct of compulsory interviews, and imprisonment for those who do not co-operate;
- g. the provisions of the bills relating to requirements to provide information to the Australian Building and Construction Commission during interviews including provisions that interviewees have no right to silence;
- h. the provisions of the bills that introduce the law of conspiracy into the industrial regulation of the building and construction industry;
- i. whether the provisions of the bills relating to occupational health and safety in the building and construction industry are adequate to protect the health and safety of employees and contractors in the industry; and
- j. any other related matter.<sup>1</sup>

---

1 *Journals of the Senate*, 4 December 2013, p. 233.

## Previous inquiry

1.1 The referral was immediately preceded by an inquiry by the Senate Education and Employment *Legislation* Committee into the bill itself. In its report tabled on 2 December 2013 that committee recommended that the bill be passed.

1.2 Prior to the committee's inquiry into the Building and Construction Industry (Improving Productivity) Bill 2013 the committee had considered much of the subject matter through a number of inquiries and reports into various legislative instruments concerning workplace regulation within the construction industry.

## Legislative History

1.3 The Building and Construction Industry (Improving Productivity) Bill 2013 currently under consideration would replace the Office of the Fair Work Building Industry Inspectorate with the re-established Australian Building and Construction Commission. The bill governs the appointments and functions of the Commission as well as those of the Office of the Federal Safety Commissioner.

1.4 The Australian Building and Construction Commission was abolished in 2012 under the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act 2012* (The current Act). The committee considered that bill in its report of February 2012.<sup>2</sup>

1.5 In 2003 the government introduced the Building and Construction Industry Improvement Bill 2003. This bill lapsed in the Senate when Parliament was prorogued in 2004. Nevertheless, the committee produced a report in June 2004 covering the 2003 bill and related matters.<sup>3</sup>

1.6 In 2005 the Building and Construction Industry Improvement Bill 2005 was introduced and passed. The committee inquired into the 2005 bill and tabled a report in May of that year. Senator Siewert introduced the Building and Construction Industry (Restoring Workplace Rights) Bill 2008. The committee inquired into and reported on this bill in November 2008.

1.7 On 17 June 2009 the government introduced the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009. The Senate referred the provisions of the bill to the committee. The bill lapsed when Parliament was prorogued on 19 July 2010. The committee inquired and presented a report in September 2009.

## Purpose of the Bill

1.8 The bill re-establishes the Australian Building and Construction Industry Commission (ABCC) that was abolished under the 2012 Act and replaced by the

---

<sup>2</sup> Senate Employment, Workplace Relations and Education References Committee *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011*, February 2012.

<sup>3</sup> Senate Employment, Workplace Relations and Education References Committee, *Beyond Cole: The future of the construction industry: confrontation or co-operation?*, June 2004.

---

Office of Fair Work Building Industry Inspectorate (FWBII). The bill proposes that the FWBII would continue in existence under the name of the ABCC. Chapter 2 would also regulate the appointment and functions of the Australian Building and Construction Industry Commissioner (ABC Commissioner).

1.9 The bill would provide powers to either the Minister or to the ABC Commissioner and staff to:

- issue a Building Code which includes providing the ABC Commissioner with the power to require a person to report on his or her compliance with the Code;
- prohibit unlawful industrial action if the action has a connection to a constitutionally-covered entity;
- prohibit coercion of persons in relation to the engagement of contractors and employees or choice of superannuation fund;
- prohibit coercion or undue pressure on persons in relation to Commonwealth industrial instruments; and
- obtain information.

1.10 The bill also includes enforcement provisions and deals with administrative matters.

### ***The Building Code***

1.11 Chapter 3 of the bill would provide the Minister with the power to issue a Building Code. The current Building Code was issued by Legislative Instrument under the *Fair Work (Building Industry) Act 2012* and commenced on 1 February 2013. While the Minister had the power to issue a Building Code under the *Building and Construction Industry Improvement Act 2005(Superseded)* this was never exercised.

1.12 This bill adds a provision that building industry participants may be directed to report to the ABC Commissioner on their compliance with the Code.

### ***Unlawful Industrial Action***

1.13 Chapter 5 of the bill prohibits unlawful industrial action. Unlawful industrial action includes bans on working, employees failing to attend work and employers locking out employees.<sup>4</sup> This Chapter would apply only if the unlawful action or unlawful picket has a connection to a constitutionally-covered entity. Any person would be able to apply for an injunction to restrain a person from organising or engaging in unlawful industrial action or an unlawful picket in relation to building work.<sup>5</sup>

---

<sup>4</sup> Building and Construction Industry (Improving Productivity) Bill 2013, s 44.

<sup>5</sup> Explanatory Memorandum, Building and Construction Industry (Improving Productivity) Bill 2013, p. 3.

1.14 The bill also states that the provisions in Part 3-3 of the *Fair Work Act 2009* relating to strike pay would also apply in relation to unlawful industrial action.

### ***Coercion, discrimination and unenforceable agreements***

1.15 Chapter 6 would prohibit action that:

- intends to coerce a person to employ or engage individual employees or independent contractors;
- intends to coerce a person to assign particular duties or responsibilities to people or contractors;
- intends to make an employee or employer nominate a particular superannuation fund.

1.16 In addition, the chapter proposes to ban actions that intend to coerce or apply undue pressure to make, vary or terminate enterprise agreements.

1.17 Part 3 of Chapter 6 would make an agreement unenforceable if the agreement is entered into with the intention to secure standard employment conditions for building employees at a particular site and not all the employees are employed in a single enterprise.

### ***Obtaining Information***

1.18 The powers to obtain information in relation to an investigation of a suspected contravention of the bill or a designated building law are set out in Chapter 7. The bill would give the ABC Commissioner the power to issue an examination notice to a person directing them to provide documents or information relevant to the investigation. The person would have 14 days to comply.

1.19 These powers were first introduced in the Building and Construction Industry Improvement Bill 2005. The powers were retained in the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act 2012 but with a requirement to notify the Commonwealth Ombudsman of the issue of an examination notice. This provision has been retained in the bill.

### ***Compatibility with human rights***

1.20 The explanatory memorandum states that the Building and Construction Industry (Improving Productivity) Bill 2013 is compatible with the human rights and freedoms recognised or declared in the international instruments listed in the *Human Rights (Parliamentary Scrutiny) Act 2011*.

1.21 A number of human rights are engaged by the bill, including: the right to freedom of association, the right to just and favourable conditions of work, the right to a fair trial, the right to peaceful assembly, the right to freedom of expression, and the right to privacy and reputation. The explanatory memorandum submits that the measures contained in the bill are reasonable and proportionate.

1.22 The Parliamentary Joint Committee on Human Rights (PJCHR) considered the bill in its report of 10 December 2013. Analysis of the PJCHR's findings,

including consideration of the various rights engaged by the bills is discussed in Chapter 3.

### **Acknowledgement**

1.23 The committee thanks those individuals and organisations who contributed to the inquiry by preparing written submissions and giving evidence at the hearing.

### **Notes on references**

1.24 References in this report to the Hansard for the public hearing are to the Proof Hansard. Please note that page numbers may vary between the proof and the official transcripts.