

The Senate

Education and Employment
Legislation Committee

Building and Construction Industry
(Improving Productivity) Bill 2013 [No.2]
[Provisions]

Building and Construction Industry
(Consequential and Transitional Provisions)
Bill 2013 [No.2] [Provisions]

March 2016

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CHAPTER 1

Introduction and Background

Reference

1.1 On 4 February 2016, the Senate referred the provisions of the Building and Construction Industry (Improving Productivity) Bill 2013 [No. 2] and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [No. 2] to the Education and Employment Legislation Committee for inquiry and report by 15 March 2016.¹

Conduct of the inquiry

1.2 Details of the inquiry were made available on the committee's website and the committee also contacted a number of organisations inviting submissions to the inquiry. Submissions were received from 20 organisations as listed in Appendix 1. A public hearing was held in Canberra on Friday, 5 March 2016. The witness list for that hearing is available in Appendix 2.

Note on references

1.3 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 official Hansard transcripts.

Background to the Bill

1.4 The Building and Construction Industry (Improving Productivity) Bill 2013 (the Bill) fulfils the Government's election commitment to re-establish the Australian Building and Construction Commission (ABCC).²

1.5 The Bill is intended to substantially replicate the *Building and Construction Industry Improvement Act 2005* (the BCII Act) which responded to the workplace relations recommendations of the Royal Commission into the Building and Construction Industry (the Royal Commission), which reported in 2003.³

Legislative History

1.6 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 2012.⁴ Over the last decade or so the committee has considered much of the subject matter and many of the key issues contained in this bill.

1 *Journals of the Senate*, No. 137—4 February 2016, p.3710

2 *Explanatory Memorandum*, p. 50.

3 *Explanatory Memorandum*, p. 50.

4 See Senate Education and Employment Legislation Committee, *Building and Construction Industry (Improving Productivity) Bill 2013 and Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013*, December 2013, pp 1-2.

1.7 In 2003 the Royal Commission into the Building and Construction Industry released its reports and findings. Consequently, 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.⁵

1.8 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.⁶

1.9 The Building and Construction Industry (Restoring Workplace Rights) Bill 2008 was introduced as a private members' bill and the committee inquired into and reported on this bill in November 2008.⁷

1.10 On 17 June 2009 the former Labor 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 2009.⁸

1.11 On 14 November 2013 the government introduced the Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013. The Senate referred the provisions of the bills to the Senate Education and Employment Committee for inquiry and report by 2 December 2013.⁹ The bills were negatived in the Senate on 17 August 2015.¹⁰

1.12 On 4 February 2016, the Building and Construction Industry (Improving Productivity) Bill 2013 [No. 2] and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [No. 2] were introduced and

5 See Senate Education and Employment Legislation Committee, *Building and Construction Industry (Improving Productivity) Bill 2013 and Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013*, December 2013, p.2.

6 See 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]*, December 2013, p. 2.

7 See 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]*, December 2013, p. 2.

8 See 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]*, December 2013, p. 2.

9 *Journals of the Senate*, No. 3—14 November 2013, pp 124–127.

10 *Journals of the Senate*, No.107—17 August 2015, pp 2955–2956.

read a first time in the Senate. The bills were referred to the Senate Education and Employment Legislation Committee for inquiry and report by 15 March 2016.¹¹

Findings of the Committee in 2013

1.13 In its report, tabled on 2 December 2013,¹² the committee considered the Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 and recommended they be passed by the Senate, unamended.

1.14 The committee notes that there are no changes to the current bills, and refers the Senate to its 2013 report.¹³

Acknowledgement

1.15 The committee thanks those individuals and organisations who contributed to the inquiry by preparing written submissions, giving evidence at the hearing and responding to questions taken on notice.

11 *Journals of the Senate*, No. 137—4 February 2016, pp 3710–3712

12 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]*, December 2013.

13 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]*, December 2013.

CHAPTER 2

Issues

2.1 The key purpose of the bill is to re-establish the Australian Building and Construction Commission (ABCC) in line with the Government's election commitment.¹

2.2 The committee notes the progress of the bills and the extensive work undertaken to date in inquiries about the bills, as outlined in Chapter 1 of this report.

2.3 The committee notes that while it received submissions criticising the bills, no fresh arguments have been made against the re-establishment of the ABCC since the committee previously considered this proposed legislation in 2013.

2.4 The main argument put forward to oppose the bills remains that there is no need for special laws for the building and construction industry and that such laws would unfairly single out the industry for treatment different to other industries.

2.5 The committee notes that arguments made against the bills suggest an aversion amongst unions towards special attention being paid to the building and construction industry, despite widespread and serious unlawful conduct identified during a range of inquiries.

2.6 The committee is disappointed that, in light of indisputable evidence, certain union officials in the building and construction industry continue to flout the law and deny that an industry-specific focus is required to combat this serious and persistent unlawful behaviour.

2.7 The Australian Council of Trade Unions (ACTU) states in its submission:

We do not suggest that the construction industry is immune from corruption, and in fact official statistics from the Australian Securities and Investment Commission suggest that it is a poor performing sector on that front.²

2.8 Similarly, the Construction, Forestry, Mining and Energy Union (CFMEU) acknowledges in its joint submission with the Australian Manufacturing Workers Union, Australian Workers Union and Transport Workers Union of Australia:

Over three hundred and fifty ordinary construction workers are currently facing prosecution by the FWBC.³

2.9 In spite of these admissions, these organisations remain unwilling to acknowledge that the industry faces significant challenges because of the unlawful behaviour of union representatives and thus, the industry requires special attention by

1 *Explanatory Memorandum*, p. 2.

2 Australian Council of Trade Unions, *Submission 2*, p. 3.

3 Construction, Forestry, Mining and Energy Union, *Submission 7*, p. 8.

a regulator designed to focus on the problems inherent to and unique in the building and construction industry.

2.10 The committee is not persuaded by the arguments against the bills, particularly in light of acknowledgements by some unions that problems exist within the building and construction industry.

2.11 The committee further notes that given these bills have been considered previously, many submitters drew the committee's attention to earlier submissions they had made, rather than employing additional time and resources towards extensive new submissions.⁴ The committee considers that this approach is indicative of a view amongst submitters that this inquiry is a waste of time and resources.

2.12 Given the previous inquiries about this proposed legislation, and related reference inquiry in 2014⁵, the committee considers that this inquiry constitutes a gross abuse of process, whereby the valuable time and resources of senators, submitters and others have been misused in pursuing matters already dealt with in full.

2.13 Further, this inquiry into matters already considered in full has unreasonably delayed the chamber from considering the bills.

2.14 The committee agrees with comments made by Senator Fifield, Manager of Government Business in the Senate, Minister for the Arts and Minister Assisting the Prime Minister for Digital Government, in relation to referral of the bills to this committee and the reporting date:

The government is disappointed that the chamber has chosen to set the reporting date that it has for the reference to the Senate Education and Employment Committee, and we are disappointed for the reasons well outlined by the Attorney and Minister Cash. This legislation has had extended, considered—sometimes thoughtful—examination by this chamber and by not one committee of the Senate but two committees of the Senate: the references committee and the legislation committee. In no way, shape or form can it be said that there has not previously been proper consideration and full debate in relation to this legislation. It cannot be said that it has not been considered and properly debated.

Despite the fact that that legislation has previously been defeated and is being reintroduced, nevertheless it is appropriate that there is proper consideration of this legislation, and the government is not suggesting for a moment that there should not be that proper consideration at each stage of the legislation through this chamber. What the government is saying is that this chamber should be given the opportunity to do that in a reasonable period of time. What the opposition and other colleagues, together, are seeking to do is unreasonably delay the consideration of this legislation and

4 For example: Construction, Forestry, Mining and Energy Union, *Submission 7*; Australian Chamber of Commerce and Industry, *Submission 1*; Department of Employment, *Submission 5*; Australian Industry Group, *Submission 10*.

5 Senate Education and Employment References Committee, *Governments approach to re establishing the Australian Building and Construction Commission*, March 2014.

unreasonably delay the opportunity for the chamber to pass judgement by way of a vote in this place.

There is no provision in this legislation that is different from that which has previously been through the House and which has previously been presented to this chamber, considered by this chamber and failed to enjoy the support of this chamber. There are no provisions which are different. This is the same legislation. It has had a thorough consideration by the committees of this Senate. I should also indicate that the Scrutiny of Bills Committee, another important organ of this place, has previously, in the ordinary course of events, also looked at this legislation. It is clear—as you, Mr Deputy President, would know from your own following of these matters—that this particular proposition, which we seek to give effect to in this legislation, is one that the coalition has been very clear about for a long period of time, both prior to the last election and during this term of government. There is good and sound reason for this legislation to be passed.⁶

2.15 Given the time already spent scrutinising the proposed legislation, the committee considers that the Senate's referral of these bills to the committee, especially with the reporting date of 15 March 2016, is outside the proper processes of deliberative debate in that chamber. It was an excessive indulgence in the processes of the Senate, beyond what is required to give the Senate a reasonable opportunity to debate and pass the legislation.

2.16 The committee considers that the referral of these bills constitutes an evasion of the Senate's proper law-making function. The Senate has unreasonably delayed consideration of the bills, engaging in an excessive use of otherwise appropriate parliamentary procedures.

2.17 The committee notes the significant workload of Senate committees at the present time, and the large number of inquiries under way.

2.18 The committee draws the Senate's attention to its previous report for a more in depth discussion, rather than explore in this report, issues previously dealt with in full.

Recommendation

2.19 The committee recommends that the Senate pass the bills.

Senator Bridget McKenzie

Chair

6 Senator the Hon Mitch Fifield, Manager of Government Business in the Senate, Minister for Communications, Minister for the Arts and Minister Assisting the Prime Minister for Digital Government, *Proof Senate Hansard*, 4 February 2016, p. 29.

LABOR SENATORS' DISSENTING REPORT

Introduction

1.1 Labor Senators do not see merit in the Building and Construction Industry (Improving Productivity) Bill 2013 [No.2] and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [No.2] and, as with the previous iteration of the Bills, oppose both in their entirety without amendment.

1.2 The Government's repeated attempts to re-enact the Australian Building and Construction Commission (the ABCC) is not based on a genuine requirement for workplace reform, but solely on political motivation. The Chair's report supports this, in that the entirety of the report points not to the Bill, but instead to an attack on the Senate and the current Senate's opposition to the Bill.

1.3 We continue to support our dissenting report to the Committee Inquiry into the Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 of 2 December 2013. As these Bills do not differ substantially from the previous set of legislation, we will therefore utilise this committee process to express additional concerns and build upon previous arguments against the legislation.

1.4 The Bill would re-establish the ABCC, providing the Australian Building and Construction Commissioner with extensive and coercive questioning powers¹ and introduce civil penalties for union activity. Labor Senators again argue that specific laws targeting the construction industry and the introduction of coercive powers continue to be unnecessary.

The bills will not improve productivity

1.5 Supporters of the bill claim that the 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 and has been shown to be completely inaccurate by experts Professor David Peetz, Cameron Allan, Andrew Dungan² and the Hon. Murray Wilcox QC.

1.6 Productivity improvement was not a finding of the 2013 Independent Economics report, commissioned by Master Builders Australia.³ Neither was it a

1 Building and Construction Industry (Improving Productivity) Bill 2013, Chapter 7, Part 2.

2 Cameron Allan, Andrew Dungan, and David Peetz, *'Anomalies', Damned 'Anomalies' and Statistics: Construction Industry Productivity in Australia*, February 2010.

3 Independent Economics, *Economic Analysis of Building and Construction Industry Productivity: 2013 Update*, 26 August 2013, Report prepared for Master Builders Australia, http://www.independenteconomics.com.au/information/Reports/BCI%20productivity_2013_fin al.pdf (accessed 9 March 2016).

finding of the 2010⁴ or 2008 reports.⁵ In 2014 the Government's Productivity Commission, as part of a wider study on infrastructure found:

Productivity growth in the Australian construction sector has ebbed and flowed over the last 30 years. There was a significant increase in labour and multifactor productivity from 1994-95 to 2012-13. However, most of the improvement was concentrated in relatively short bursts spanning just a few years, including most recently in 2011-12.⁶

1.7 The government and employer organisations argue alleged improvements in productivity in the building industry as one of the reasons they want to see a reintroduction of the ABCC. One presumes any improved productivity includes improved health and safety on construction sites. This is not the case. The number of deaths and injuries is unacceptable.

1.8 Unfortunately and disappointingly the government's submission, while acknowledging a reintroduced ABCC will not go to health and safety issues, distorts health and safety data to erroneously claim deaths and injuries improved under the former ABCC.

1.9 When questioned on deaths and injuries in the construction industry all employer organisations—the Australian Chamber of Commerce and Industry (ACCI), Australian Industry Group (AiGroup) and the Master Builders—admitted their organisations had no research or other data on construction health and safety. It was made clear to the inquiry that it was just not on their agenda. All of this reinforces that the reintroduction of the ABCC bill is a political move by the government.

1.10 This matter has been extensively explored and disputed in previous reports to this committee⁷ and therefore we will not further revisit this matter, except to say that these facts counter the argument that the basis of this bill is of a productivity not political motivation.

4 KPMG, *Economic Analysis of Building and Construction Industry Productivity: 2010 Report*, 26 July 2010, Report prepared for Master Builders Australia, <http://acci.asn.au.web02.wwwserver.com.au/getattachment/076685a3-f43c-4840-8322-01be5418a3f8/KPMG-Econtech---Economic-Analysis.aspx> (accessed 9 March 2016).

5 Econtech, *Economic Analysis of Building and Construction Industry Productivity: 2008 Report*, Report prepared for the Office of the Australian Building and Construction Commissioner, Canberra, Econtech Pty Ltd, 30 July 2008.

6 Productivity Commission, Public Infrastructure, *Inquiry Report*, Volume 2, No. 71, 27 May 2014, p. 392, http://www.pc.gov.au/_data/assets/pdf_file/0005/137282/infrastructure-volume2.pdf (accessed 9 March 2016).

7 Senate Education and Employment Legislation Committee, *Building and Construction Industry (Improving Productivity) Bill 2013 and Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013*, December 2013; Senate Education and Employment References Committee, *Governments approach to re establishing the Australian Building and Construction Commission*, March 2014.

Special laws that target the building and construction industry are politically motivated, and unnecessary

1.11 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. Both the Wilcox inquiry in 2009 and the Report of the Royal Commission into Trade Union Governance and Corruption dismissed the suggestion that the building industry needed industry specific industrial laws.⁸

1.12 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 the common law rights of workers, and provides for a genuinely independent compliance unit.

1.13 Trade unions have no tolerance for corruption and, where corrupt practices occur, they are dealt with swiftly and transparently. Evidence to support this was given at the March hearing:

Senator RICE: Can I just put one final question. I have only been in the Senate for 18 months and during the time of the current government, but I sit there in the Senate during question time and hear the attacks on the CFMEU day after day after day. We just had the industry people saying that we were seeing union thuggery, intimidation and lawlessness and that the CFMEU broke the law and then paid fines rather than comply with the laws. Could I briefly have your response to that, because it seems that we have two very different narratives going on.

...

Mr Noonan: Turning to the conduct of my union: we have over 400 officials nationally and 100 000 members, and we do not get it right all the time. Sometimes people say and do stupid things. But the laws that are enforced are enforced by a regulator whose sole purpose in life is to attack workers and unions. We have over 500 individual workers who have been, or are being, prosecuted by the FWBC for things like going to a rally in support of apprenticeships and Australian jobs.

In terms of people who behave badly, our union has acted in the past. We have no tolerance for corruption. The word 'corruption' is thrown around freely by those who support this bill—notwithstanding the fact that the bill itself does not address corruption or the criminal law. We have had junior, medium-level and indeed one very senior official who we have sacked and

8 Royal Commission into Trade Union Governance and Corruption, *Final Report: Volume 5 – Law Reform and Policy*, Commonwealth of Australia December 2015, Chapter 8, paragraph.186.

expelled from the union because their conduct did not meet the standards we expected. Some of those matters are now in front of the courts, so I do not want to name them. We do not have any time for corruption in the industry. Any official of the union, or any delegate of the union, who engages in corruption is not working for the members, they are not working for the union; they are working for the employer who has corrupted them, and we find it disgraceful. Where credible and supported allegations are brought, we deal with them.

Senator REYNOLDS: I was very heartened to hear that the CFMEU has no tolerance at all for illegal and other inappropriate behaviour.⁹

1.14 Further to this, the new legislation would extend the ABCC's reach to all workers that supply, transport or prefabricate manufactured goods.¹⁰ Extending the powers of the ABCC outside of the building and construction industry proper applies an extra, unnecessary level of legislation that extends even further than the BCII legislation that initially established the ABCC.

The removal of the ABCC by the Labor Government was supported by independent investigation

1.15 In 2009 the Labor Government committed to undertake a review of the *Fair Work Act 2009* (FW Act). This was not an amendment rushed through without extensive consultation and without support, as has been the case with the shambolic, repeated introduction (and re-introduction) of these Bills.

1.16 On 22 December 2011 the then Minister announced an independent panel of three experts to conduct a post-implementation review of the legislation in accordance with this commitment. The Fair Work Act Review Panel (the Panel) completed its deliberations and delivered its report—*Towards more productive and equitable workplaces: An evaluation of the fair work legislation (the Report)*—in June 2012.¹¹ The Panel made 53 mainly technical recommendations to improve the operation of the legislation without compromising productivity and fairness in the workplace. The Office of Best Practice Regulation (OBPR) in the Department of Finance and Deregulation confirmed the Report met the best practice regulation requirements.

1.17 The Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2012 was developed following extensive consultation with superannuation industry stakeholders, members of the National Workplace Relations Consultative Council and their technical advisers through the Committee on

9 See *Committee Hansard*, 4 March 2016, pp 22–23.

10 Building and Construction Industry (Improving Productivity) Bill 2013, Chapter 1, Subsection 6(1), Paragraphs (d) and (e).

11 Australian Government, *Towards more productive and equitable workplaces – An evaluation of the Fair Work legislation*, 5 June 2012, https://docs.employment.gov.au/system/files/doc/other/towards_more_productive_and_equitable_workplaces_an_evaluation_of_the_fair_work_legislation.pdf, (accessed 9 March 2016).

Industrial Legislation, and State and Territory government officials.¹² It passed through the House of Representatives on Thursday 16 February 2012.

1.18 Further to this, Labor Senators of the committee again reiterate that the FW Act already regulates rights and restrictions of protected industrial action, and that the rate of disputation has not increased since the ABCC was abolished.

The powers provided to the Australian Building and Construction Commission under the Bills represent a denial of basic rights and liberties

1.19 Should these bills pass the Senate, the ABCC would be able to use coercive powers stronger than those provided to even the state or federal police to compel workers to give evidence and be interviewed, with no right to silence or representation by a lawyer of their choice.¹³

1.20 The Law Council of Australia, in presenting the Bills' inconsistencies, argue that the Bills are:

... contrary to rule of law principles and traditional common law rights and privileges such as those relating to the burden of proof, the privilege against self incrimination, the right to silence, freedom from retrospective laws and the delegation of law making power to the executive. It is also unclear as to whether aspects of the Bill which infringe upon rights and freedoms are a necessary and proportionate response to allegations of corruption and illegal activity within the building and construction industry.¹⁴

1.21 These powers impact upon the basic rights of individuals, including the right to protection of property and privacy, the right to silence, and statutory rights to the protection of personal information.

1.22 Chapter 7 Part 2 of the Bill would invest the ABCC Commissioner (or his or her delegate) with coercive powers to require any person to produce information or documents to the ABCC Commissioner and answer questions or provide information under oath or affirmation where the Commissioner reasonably believes that the person has information or documents relevant to an investigation.

1.23 Labor Senators wish to note that even in the interrogation of suspected terrorists, a warrant must be issued by a Federal Judge or Magistrate.¹⁵ The ABCC under these Bills would operate with more coercive powers than the Australian Security Intelligence Organisation (ASIO).

1.24 The passage of the Bills would also allow the ABCC to initiate or pursue matters (including instigating court proceedings) in respect of matters that were settled

12 Fair Work Amendment Bill 2012, *Explanatory memorandum*, p. 2.

13 *Bonan v Hadgkiss* (Deputy Australian Building and Construction Commissioner) [2006] FCA 1334.

14 The Law Council of Australia, *Submission 3*, p. 3.

15 *Australian Security Intelligence Organisation Act 1979*, Part 3, Division 3.

prior to the new Act taking effect.¹⁶ 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.

1.25 The former ABCC was found to systematically overstep its legislated reach, confirmed by answers to Parliamentary questions on notice that revealed the ABCC used defective Section 52 notices to question workers on at least 203 occasions.¹⁷ There exists no clause in either the Bills or the explanatory memorandum that would protect workers against similar behaviour. In fact, the widely inappropriate delegations of legislative power contained in the Bill allowing the ABCC Commissioner to delegate his or her powers to 'a person... prescribed by the rules'¹⁸ would lead to circumstances such as this being more likely to occur.

1.26 Labor Senators note the ABCC's case against construction worker Ark Tribe that was thrown out by the South Australian Magistrate after finding the Commissioner had failed to properly delegate his powers, costing Australian taxpayers over \$100 000 for a single case.

The Telecommunications (Interception and Access) Act and the Fair Work Building and Construction (FWBC)

1.27 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.

1.28 In October 2015, the Government passed an amendment to the *Telecommunications (Interception and Access) Act 1979*. In addition to introducing compulsory metadata retention, it restricted the number of organisations that could have unrestricted access. Under the amended legislation only 21 organisations are allowed unrestricted access as 'criminal law-enforcement agencies'.

1.29 In a Freedom of Information request obtained in January of this year, the Fair Work Building and Construction (FWBC), which, if these Bills are passed will be renamed to the ABCC, has requested to be added to the list of organisations who have that unrestricted access, and be listed as a 'criminal law-enforcement agency'.

16 Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013, Schedule 2 – 2(3).

17 Responses to questions on notice, Senate Education and Employment Legislation Committee, Budget Estimates 2011–2012:
http://www.aph.gov.au/~media/Estimates/Live/eet_ctte/estimates/bud_1112/answers/EW0119_12.ashx;
http://www.aph.gov.au/~media/Estimates/Live/eet_ctte/estimates/bud_1112/answers/EW0120_12.ashx;
http://www.aph.gov.au/~media/Estimates/Live/eet_ctte/estimates/bud_1112/answers/EW0122_12.ashx

18 Building and Construction Industry (Improving Productivity) Bill 2013, Chapter 2, Part 2, Section 19(1)(d).

1.30 In the last dissenting report to this Bill, the Labor Senators included a section titled 'The ABCC has no power in criminal matters', which suggested that as the ABCC has no criminal jurisdiction, any argument that the agency would quell organized crime in the building and construction industry was deliberately misleading.

1.31 Obviously these recent developments demonstrate that the FWBC, ahead of the passage of these bills, does wish to become a criminal law-enforcement agency with access to unrestricted metadata. This adds to the argument made by Labor Senators that the FWBC, when it is renamed to the ABCC, wishes to be to building and construction workers what ASIO is to terrorists.

1.32 Labor Senators call on the Government to ensure the FWBC or the ABCC are not granted unrestricted access to metadata.

The Bills have the potential to breach Australia's commitment to its trading partners

1.33 To proactively legislate against the UN's International Labour Organisation (ILO) conventions is unacceptable action by the Australian Parliament.

1.34 The former BCII Act was found repeatedly and unequivocally by the ILO to constitute a serious breach of Australia's obligations both as a member-state and as a signatory to specific conventions including the *Freedom of Association and Protection of the Right to Organise Convention, 1947 {No. 87}*, the *Right to Organise and Collective Bargaining Convention, 1949 {No. 98}* and the *Labour Inspection Convention, 1947 {No. 81}*.

1.35 The ACTU gives evidence in its submission to this inquiry that:

...the most significant change in environment has been Australia's recent adoption of the *Korea-Australia Free Trade Agreement* and the *Trans Pacific Partnership Agreement*. Through those instruments, Australia has re-stated its commitment to its trading partners to the very international labour rights that the International Labour Organization has found the ABCC laws to have violated. For the Government to knowingly and so enthusiastically renege on those commitments, particularly so soon after re-stating them, is enormously disappointing and potentially damaging to our trading relationships.¹⁹

1.36 This is of particular concern with regard to the Trans Pacific Partnership. The substantive obligations under Chapter 19 of that agreement provide that Australia:

- Affirms its obligations as a member of the ILO; and
- Specifically commits to adopt and maintain in its statutes and regulations and practices, the rights of freedom of association and the effective recognition of the right to collective bargaining as stated in the

19 Australian Council of Trade Unions, *Submission 2*, p. 2.

Declaration on Fundamental Principles and Rights at Work and its Follow-up.²⁰

1.37 It is therefore particularly unacceptable that the same Government that argued the case for Australia to sign onto these agreements is now actively legislating in breach of those agreements.

The Australian Building and Construction Commission would see an increase of workplace injuries and deaths

1.38 Under this legislation, the ABCC could seek to have any workplace meeting deemed illegal (including one related to OHS) and fine workers who attend \$36 000 each and the union \$180 000 if it called the meeting, or did anything outside the narrow definition of 'protected action'. Evidence provided to the Committee argues that this would impact on worker's motivation to report and have investigated workplace health and safety matters.²¹

1.39 Labor Senators remind the Committee that data from the Australian Bureau of Statistics suggests that close to 10 per cent of all workplace injuries occur in the construction industry, and that between 2013 and 2014 over 50 000 people in that industry suffered a work related injury.²² In 2014, the construction industry accounted for 16 per cent of workplace fatalities.²³ In 2015 the industry accounted for 13 per cent, and to date accounts for almost 27 per cent of workplace fatalities.²⁴

1.40 Should we assess the widening of the scope contained in this bill to transport and logistics, the statistics increase markedly, to 41 per cent of all fatalities in 2014, 42 per cent in 2015, and shockingly more than half (53 per cent) of all fatalities this year to date.²⁵

1.41 Labor Senators argue that these statistics should be of far more concern to the Committee than demonstrated by the Chair's draft report.

20 Department of Foreign Affairs and Trade, *Summary of the Trans-Pacific Partnership Agreement*, p. 9, <https://dfat.gov.au/trade/agreements/tpp/Documents/summary-of-the-tpp-agreement.pdf> (accessed 9 March 2016).

21 Australian Council of Trade Unions, *Submission 2*, p. 5.

22 Australian Bureau of Statistics, *Work-Related Injuries, Australia Jul 2013 to Jun 2014*, Catalogue No. 6324.0, Table 4, <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6324.0> (accessed 9 March 2016).

23 Safe Work Australia, *Work Related Traumatic Injury Fatalities, Australia 2014*, October 2015.

24 Safe Work Australia, Worker fatalities, <http://www.safeworkaustralia.gov.au/sites/swa/statistics/work-related-fatalities/pages/worker-fatalities> (accessed 9 March 2016).

25 Safe Work Australia, Worker fatalities, <http://www.safeworkaustralia.gov.au/sites/swa/statistics/work-related-fatalities/pages/worker-fatalities> (accessed 9 March 2016).

The Building and Construction Industry (Fair and Lawful Building Sites) Code

1.42 In the Second Reading Speech for the Bills, the Government confirmed that its 2014 Building and Construction Industry (Fair and Lawful Building Sites) Code (Code) was to take effect concurrently to these Bills. Labor Senators therefore wish to note that the Code would result in any Enterprise Bargaining Agreement (EBA) linked with Commonwealth-funded work to align to certain conditions.

1.43 The Code will remove worker's ability to access shift-allowances, and will prohibit:

- any clauses that prevent unlimited ordinary hours worked per day,
- guaranteeing the days off on Christmas Day and Easter Sunday, Public holidays and;
- the inclusion of guaranteed stable and secure shift arrangements or rosters.

1.44 It is worth noting the evidence of the Electrical Trades Union with regard to the impact of the Code:

... the construction industry has a number of characteristics that are potential workplace stressors that may affect workplace health and safety, including long hours, tight deadlines, severe financial penalties if targets are not met, non-permanent employment, six day working weeks (sometimes thirteen-day fortnights), early starts, as well as the intrinsic dangers arising from working at heights, and with heavy equipment and electricity. Stress through work and associated work-life interference have been shown to be associated with problems in wellbeing, psychological strain, psychiatric disorders and substance abuse. Thus mental health is a major safety issue in construction. Through much of the 2000s, the age standardised suicide rates of male construction workers in New South Wales and Queensland were well above the general population in those states, though finally in 2012, after considerable program activity (the 'MATES' program in Queensland) suicide rates in Queensland construction fell to the state average.²⁶

1.45 Importantly for young and older workers, it would also remove any references to encouraging apprentices or discouraging discrimination against mature workers.

1.46 The Code will prohibit any clauses that will impact on the rights of construction workers to have a safe workplace. The prohibition on agreements including safe working hours will lead to more deaths and injuries and more exploitation.

1.47 During the operation of the former ABCC, fatalities for all workers increased by more than 25 per cent, while fatalities for construction workers skyrocketed from an average of 2.5 fatalities per 100 000 to almost five fatalities per 100 000 workers.

26 Electrical Trades Union of Australia, *Submission 18*, p. 22.

1.48 The Code also states that enterprise agreements with building companies cannot contain terms to ensure that labour hire workers are not discriminated against in their rates of pay for doing the same work, and that enterprise agreements with builders cannot insist on only skilled, trained tradespeople doing dangerous work.

Conclusion

1.49 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

1.50 That in view of the *now repeated* failure of the government and proponents of the re-establishment of the ABCC to:

- **establish an economic or productivity case for the ABCC;**
- **address the very serious incursions on human rights in the bills;**
- **establish the uniqueness of the building and construction industry sufficient to warrant draconian powers and penalties;**
- **establish that the coercive powers proposed for the ABCC are subject to sufficient oversight and safeguards; and**
- **establish that the ABCC would improve occupational health and safety in the building and construction industry;**

The Senate not support the re-establishment of the Australian Building and Construction Commission and, accordingly, not pass the Building and Construction Industry (Improving Productivity) Bill 2013 [no.2] and related bill.

**Senator Sue Lines
Deputy Chair**

AUSTRALIAN GREENS' DISSENTING REPORT

Overview

1.1 The best way of understanding the implications of Building and Construction Industry (Improving Productivity) Bill 2013 [No.2] and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [No.2] is to examine experience of the operation of the Australian Building and Construction Commission (ABCC) during its seven years of existence.

Conduct of the ABCC

1.2 The ABCC failed to act as independent regulator committed to the best interests of the industry, the conditions of the workers and the needs of legitimate employers.

1.3 This ABCC was unwilling or unable to address industry employers engaging in illegal activities including the widespread use of misleading contracts. Construction companies signing up workers as independent contractors instead of hiring them as employees remains a serious issue that reduces industry standards. For employees it means they lose basic work and safety rights.

1.4 The construction industry is one of this country's top four most dangerous industries. The ABCC never took an employer to court over breaches of occupational health and safety laws. The number of deaths in the construction industry increased during the period that the ABCC was in operation. In 2004 the number of deaths was 3.14 per 100 000 workers. In 2007 it stood at 4.8 and in 2008 at 4.27, per 100 000 workers.

1.5 The coercive powers of the ABCC, which could subject construction industry workers to secret interrogations and force them to answer questions under oath, resulted in construction workers having fewer rights than other workers.

1.6 The Greens believe a person should not have fewer rights than an accused criminal simply because they work in the building industry. People shouldn't fear being hauled into secret inquisitions and forced to 'name names' under threat of imprisonment. We do not want or need McCarthyism in the building industry.

Recommendation 1

1.7 That the Building and Construction Industry (Improving Productivity) Bill 2013 [No.2] and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [No.2] not be passed.

The need for a national corruption body

1.8 Evidence to the committee supported the need for a broad-based corruption watchdog, rather than establishing a body whose focus is to attack unions. A **broad-based federal anti-corruption body** would be able to investigate and pursue corruption at all levels in society.

1.9 The experience of ICAC in NSW shows that corruption is not limited to one industry or arena, including Parliamentarians. If the government was serious about tackling corruption it would establish such a body at the Commonwealth level.

Recommendation 2

1.10 That the government establish a broad-based federal anti-corruption body.

Building code

1.11 The Building and Construction Industry (Improving Productivity) Bill 2015 [No.2] also contains provisions in relation to the Building Code that are very concerning. The provisions will enable a new Building Code that, estimates suggest, will impact on more than 1 million Australian workers. Significant existing employment conditions for construction workers will be prohibited.

1.12 The Building Code will apply not only to employers tendering for government construction projects, but also all employees working in the private sector of the entity tendering for government work; all entities that supply transport or prefabrication manufacturing to government jobs; and other entities that include contracting or transport suppliers.

1.13 Evidence to the committee showed that the Building Code provision will enable the Commonwealth government to prevent local agreements having clauses for a range of matters including guarantees on the numbers of apprentices.

1.14 For example, 76 clauses in current Electrical Trades Union construction agreements could be prohibited, including clauses:

- that prevent unlimited ordinary hours worked per day;
- that guarantee the employee's ability to have a day off on Christmas Day and Easter Sunday, public holidays etc;
- that encourage employment of apprentices;
- that discourage discrimination against mature workers;
- that include agreed stable and secure shift arrangements or rosters;
- that ensures construction workers conditions and entitlements cannot be eroded;
- that provide for equality and fairness onsite for construction workers; and
- that impact on the rights of construction workers to have a safe workplace.

Recommendation 3

1.15 That the provisions in relation to the Building Code be removed from the Bill.

Conclusion

1.16 The Australian Greens will always stand up for people's rights at work. We urge Senators not to support this bill.

Senator Janet Rice

Australian Greens

APPENDIX 1

Submissions and Additional Information received by the Committee

Submissions:

1. Australian Chamber of Commerce and Industry
2. Australian Council of Trade Unions
3. Law Council of Australia
4. UnionsWA
5. Australian Government Department of Employment
6. Master Builders Australia
7. Construction, Forestry, Mining And Energy Union
8. AMMA
9. Housing Industry Association
10. AiGroup
11. Civil Contractors Federation
12. National Electrical and Communications Association (NECA)
13. Timber Merchants Association (Vic)
14. Maritime Union of Australia
15. NSW Farmers
16. Australian Services Union
17. Australian Business Industrial
18. Electrical Trades Union of Australia
19. Queensland Law Society
20. Queensland Council for Civil Liberties

Answers to Questions Taken on Notice:

- Answers to questions taken on notice from Friday, 4 March 2016 Public hearing.
 - Department of Employment
 - Australian Industry Group
 - Australian Chamber of Commerce and Industry.
 - Master Builders Australia
 - Australian Council of Trade Unions
 - Construction, Forestry, Mining And Energy Union

Tabled documents

- Canberra 4 March 2016, Tabled Document, Department of Employment.

APPENDIX 2

Public Hearing

Friday 4 March 2016

House of Representatives 2R1

Parliament House, Canberra

Witnesses

Australian Government Department of Employment

Mr Steve Kibble, Group Manager, Work Health and Safety Policy Group

Ms Justine Ross, Branch Manager, Work Health and Safety Policy Branch

Mr Peter Southwood-Jones, Director, Building Industry Policy Team

Ms Rebecca Quill, Principal Government Lawyer, Workplace Relations Legal Group

Mr Michael Walsh, Senior Executive Lawyer (A/g), Workplace Relations Legal Group

Australian Chamber of Commerce and Industry

Mr Richard Calver, Director Workplace Relations

AiGroup

Mr Stephen Smith, Head of National Workplace Relations Policy

Master Builders Australia

Mr Wilhelm Harnisch, Chief Executive Officer

Mr Shaun Schmitke, National Director Industrial Relations

Australian Council of Trade Unions

Mr Michael Borowick, Assistant Secretary

Australian Council of Trade Unions

Mr Michael Borowick, Assistant Secretary

Construction, Forestry, Mining And Energy Union

Mr David Noonan, National Secretary

Mr Thomas Roberts