

The Senate

Education and Employment
Legislation Committee

Construction Industry Amendment
(Protecting Witnesses) Bill 2015

May 2015

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RECOMMENDATION

Recommendation 1

2.73 The committee recommends that the Senate pass the bill.

CHAPTER 1

Introduction

Reference

1.1 On 25 March 2015 Senator the Hon. Eric Abetz, Minister for Employment and Leader of the Government in the Senate, introduced the Construction Industry Amendment (Protecting Witnesses) Bill 2015 (the bill).¹

1.2 On 26 March 2015 the Senate referred the bill to the Senate Education and Employment Legislation Committee (the committee) for inquiry and report by 8 May 2015.²

Conduct of the inquiry

1.3 Details of the inquiry were made available on the committee's website. The committee also contacted a number of organisations inviting submissions to the inquiry. Submissions were received from eight individuals and organisations, as detailed in Appendix 1.

Background

1.4 In November 2011 the former Labor Government introduced the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2012³ that, when passed in 2012, abolished the Australian Building and Construction Commission (ABCC).

1.5 The compulsory investigative powers that are being extended in the current bill have existed since 2005. They are contained in previous legislation such as section 712 of the *Fair Work Act 2009*. Other agencies including the Australian Competition and Consumer Commission, the Australian Securities and Investments Commission, the Australian Prudential Regulation Authority, the Australian Taxation Office, Centrelink and Medicare are invested with similar powers.⁴

1.6 In November 2013 the Coalition Government introduced the Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 (the 2013

1 *Journals of the Senate No. 89*, 25 March 2015, pp 2400–2401.

2 *Journals of the Senate No. 90*, 26 March 2015, p. 2458.

3 The Hon. Simon Crean, Minister for Regional Australia, Development and Local Government and Minister for the Arts, *House of Representatives Hansard*, 3 November 2011, p. 12686.

4 Senator the Hon. Eric Abetz, Minister for Employment, Construction Industry Amendment (Protecting Witnesses) Bill 2015, Second reading speech, *Senate Hansard*, 25 March 2015, p. 68.

ABCC bills).⁵ The committee inquired into the ABCC bills jointly. In its report of December 2013, the committee recommended the Senate pass the 2013 ABCC bills.⁶

1.7 The 2013 ABCC bills would re-establish the ABCC to replace the Office of the Fair Work Building Industry Inspectorate, and would govern the appointment and functions of the Australian Building and Construction Industry Commissioner (ABC Commissioner).

1.8 The Building and Construction Industry (Improving Productivity) Bill 2013, which includes enforcement provisions, provides powers to either the Minister or the ABC Commissioner and staff to:

- issue a Building Code (the 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.

1.9 The Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 is consequential to the Building and Construction Industry (Improving Productivity) Bill 2013. It would wholly repeal the *Fair Work (Building Industry) Act 2012* (Fair Work (Building Industry) Act) and amend the following Acts:

- *Administrative Decisions (Judicial Review) Act 1977*;
- *Fair Work (Registered Organisations) Act 2009*;
- *Jurisdiction of Courts (Cross-Vesting) Act 1987*; and
- *Building and Construction Industry (Improving Productivity) Act 2013*.

1.10 The Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 also provides administrative arrangements relating to the transition from the institutions, functions and powers contained in the Fair Work (Building Industry) Act to those proposed in the Building and Construction Industry (Improving Productivity) Bill 2013.

1.11 The 2013 ABCC bills were passed by the House of Representatives in December 2013 and are currently before the Senate.

5 *Journals of the Senate No. 3*, 14 November 2013, p. 124.

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

Purpose and overview of the bill

1.12 The bill seeks to amend the *Fair Work (Building Industry) Act 2012* (the FW(BI) Act) to extend a sunset provision from three years to five years after the date section 45 of the Act commenced.

1.13 Due to the sunset provision, the Director of the Fair Work Building Industry Inspectorate (the Director) can only apply to a nominated Administrative Appeal Tribunal (AAT) presidential member for an examination notice relating to an investigation into suspected breaches of the FW(BI) Act or a designated building law up until 1 June 2015. This bill would extend that power until 1 June 2017.⁷

1.14 The bill also inserts a note to explain that the effect of section 46, as amended, is that application cannot be made under section 45 after 1 June 2017.⁸

1.15 As noted by the minister, the effect of the bill would be to continue existing arrangements 'until the Senate has had an opportunity to consider the legislation to re-establish the ABCC'.⁹

Compatibility with human rights

1.16 The bill engages the following human rights: the right to a fair trial contained in Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR); and the right to privacy and reputation under Article 17 of the ICCPR.¹⁰

1.17 The bill's statement of compatibility with human rights notes that to the extent that the amendments may limit human rights and freedoms, those limitations are reasonable, necessary and proportionate in the pursuit of legitimate objectives, and therefore the bill is compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.¹¹

1.18 The committee notes that the statement of compatibility provides a detailed justification of why these powers are considered reasonable and necessary. With particular regard to the right to not to incriminate oneself (right to a fair trial), the committee notes that subsection 53(2) of the FW(BI) Act provides a use and derivative use immunity. This means that information, answers or documents given or produced (either directly or indirectly) under an examination notice is not admissible in evidence against the person except for proceedings relating to compliance with the examination notice itself.

7 Construction Industry Amendment (Protecting Witnesses) Bill 2015, Item 1.

8 Construction Industry Amendment (Protecting Witnesses) Bill 2015, Item 2.

9 Construction Industry Amendment (Protecting Witnesses) Bill 2015 second reading speech, *Senate Hansard*, 25 March 2015, p. 68.

10 Construction Industry Amendment (Protecting Witnesses) Bill 2015, *Explanatory Memorandum*, p. iii.

11 Construction Industry Amendment (Protecting Witnesses) Bill 2015, *Explanatory Memorandum*, p. viii.

Financial impact statement

1.19 The explanatory memorandum states that the bill will have no financial implications.¹²

Acknowledgment

1.20 The committee thanks those individuals and organisations who contributed to the inquiry by preparing written submissions.

12 Construction Industry Amendment (Protecting Witnesses) Bill 2015, Explanatory Memorandum, p. ii.

CHAPTER 2

Introduction

2.1 The key purpose of the bill is to extend the existing compulsory powers of the Fair Work Building Industry Inspectorate (FWBC)¹ for a further two years.

2.2 Submitters supporting the bill premised their position on the argument that persistent unlawful union behaviour within parts of the building and construction industry was indefensible and detrimental, not only to the industry but, to society and the economy as a whole. These submitters concluded that the extension of the FWBC's powers was a vital tool in the effort to combat unlawful union activity, particularly in the absence of the passage of the Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 (the 2013 ABCC bills).²

2.3 In addition supporters of the bill reiterated the point they had made to previous Senate inquiries,³ namely that the powers of the FWBC are simply inadequate to tackle the current level of union lawlessness. Consequently, these submitters strongly supported the passage of the 2013 ABCC bills that would re-establish the Australian Building and Construction Commission (ABCC).⁴

2.4 Opponents of the bill argued that a special inspectorate for the building and construction industry was excessive, unnecessary, biased, and contrary to the norms of a modern democracy.⁵

2.5 These issues are discussed in greater detail below.

Key issues

Persistent unlawful union activity

2.6 Persistent unlawful activity, in particular by the Construction, Forestry, Mining and Energy Union (CFMEU), was of paramount concern to the industry organisations that submitted to the inquiry. These industry organisations were deeply

1 The Fair Work Building Industry Inspectorate is sometimes abbreviated to the FWBII (for example, in the submission by the Combined Construction Unions), but the acronym FWBC is used in this report.

2 For example, The Australian Mines and Metals Association, *Submission 1*, pp 2–3; Master Builders Australia, *Submission 3*, pp 2–4; The Australian Industry Group, *Submission 6*, pp 5–6; The Australian Chamber of Commerce and Industry, *Submission 7*, pp 1–2.

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

4 For example, The Australian Mines and Metals Association, *Submission 1*, p. 1; Master Builders Australia, *Submission 3*, pp 2–4; The Australian Industry Group, *Submission 6*, pp 5–6; The Australian Chamber of Commerce and Industry, *Submission 7*, pp 1–2.

5 For example, Australian Municipal, Administrative, Clerical and Services Union, *Submission 2*; UnionsWA, *Submission 4*, p. 1; Combined Construction Unions, *Submission 5* p. 1.

concerned not only by the scant regard for the law exhibited by elements of the CFMEU, but also by the fact that this type of behaviour seemed unique to the building and construction industry.⁶

2.7 Master Builders Australia (Master Builders) stated their ongoing concerns about 'the unique nature of the unlawful industrial behaviour of building unions both on site and off site'.⁷ The Australian Industry Group (Ai Group) asserted that 'the CFMEU and other construction unions continue to break the law on a very regular basis'.⁸

2.8 The Ai Group, Master Builders, and the Australian Chamber of Commerce and Industry (ACCI) all drew attention to the December 2014 interim report of the Royal Commission into Trade Union Governance and Corruption headed by Commissioner John Dyson Heydon AC QC.⁹

2.9 ACCI noted that the Royal Commission interim report found substantial evidence of disregard for the law:

The evidence is suggestive of the existence of a pervasive and unhealthy culture within the CFMEU, under which:

- (a) the law is to be deliberately evaded, or crashed through as an irrelevance, where it stands in the way of achieving the objectives of particular officials;
- (b) officials prefer to lie rather than reveal the truth and betray the union;
- (c) the reputations of those who speak out about union wrongdoing become the subject of baseless slurs and vilification.¹⁰

2.10 In several instances, ACCI noted that the Royal Commission interim report found evidence that several CFMEU officials sought 'to conduct their affairs with a deliberate disregard for the rule of law'.¹¹

2.11 The Australian Municipal, Administrative, Clerical and Services Union (ASU) acknowledged the importance of dealing with corrupt behaviour. However, the

6 The Australian Mines and Metals Association, *Submission 1*, p. 2; Master Builders Australia, *Submission 3*, pp 6–8; The Australian Industry Group, *Submission 6*, pp 3–6; The Australian Chamber of Commerce and Industry, *Submission 7*, pp 1–18.

7 Master Builders Australia, *Submission 3*, p. 3.

8 The Australian Industry Group, *Submission 6*, p. 3.

9 The Australian Industry Group, *Submission 6*, p. 3; Master Builders Australia, *Submission 3*, p. 3; Australian Chamber of Commerce and Industry, *Submission 7*, pp 5–11.

10 Australian Chamber of Commerce and Industry, *Submission 7*, p. 5. See also John Dyson Heydon AC QC, Commissioner, Royal Commission into Trade Union Governance and Corruption, *Interim Report*, p. 1008.

11 Australian Chamber of Commerce and Industry, *Submission 7*, p. 5. See also John Dyson Heydon AC QC, Commissioner, Royal Commission into Trade Union Governance and Corruption, *Interim Report*, p. 1008.

ASU argued that corrupt conduct 'by employers and other players within the building industry' should also be pursued with equal vigour.¹²

2.12 Union concerns about what they deemed to be the partisan approach adopted by the FWBC towards misconduct in the building and construction industry are covered in later sections of the report.

2.13 Specific case studies of apparent unlawful behaviour revealed by the Royal Commission are provided below.

Case studies

2.14 Drawing on case studies from the Royal Commission, ACCI detailed a campaign of intimidation by the CFMEU in the dispute with Grocon Pty Ltd that included an alleged unlawful secondary boycott of Boral coordinated by certain CFMEU officials. ACCI noted that the Royal Commission found that the CFMEU ban on the pouring of Boral concrete at other CFMEU-controlled sites in Melbourne 'continued in defiance of orders obtained by Boral from the Supreme Court restraining the CFMEU from carrying on the ban'.¹³

2.15 The committee notes that, in November 2014, the Australian Competition and Consumer Commission instituted proceedings in the Federal Court against the CFMEU, alleging it engaged, or attempted to engage, in secondary boycott conduct directed at Boral Resources (Vic) Pty Ltd and Alsafe Premix Concrete Pty Ltd (collectively Boral), in breach of the *Competition and Consumer Act 2010*.¹⁴

2.16 In another case study, ACCI notes that the Royal Commission described 'a deliberate and protracted campaign of industrial blackmail and extortion' conducted by officers of the CFMEU against Universal Cranes.¹⁵ ACCI notes that the Royal Commission found:

The 'campaign' the CFMEU waged against Universal Cranes involved two steps. One was the officers of the CFMEU threatening to apply pressure to customers of Universal Cranes to stop dealing with Universal Cranes unless and until the Union's demands that Universal Cranes and others enter into the Union's form of EBA were satisfied. The other involved the CFMEU acting on those threats when its demands were not satisfied by entering

12 Australian Municipal, Administrative, Clerical and Services Union, *Submission 2*, p. 2.

13 Australian Chamber of Commerce and Industry, *Submission 7*, p. 6. See also John Dyson Heydon AC QC, Commissioner, Royal Commission into Trade Union Governance and Corruption, *Interim Report*, p. 1016.

14 Australian Competition and Consumer Commission, ACCC takes court action against the CFMEU alleging secondary boycott and undue harassment or coercion, *Media release*, 20 November 2014, <https://www.accc.gov.au/media-release/accc-takes-court-action-against-the-cfmeu-alleging-secondary-boycott-and-undue-harassment-or-coercion> (accessed 22 April 2015).

15 Australian Chamber of Commerce and Industry, *Submission 7*, p. 9. See also John Dyson Heydon AC QC, Commissioner, Royal Commission into Trade Union Governance and Corruption, *Interim Report*, p. 1400.

work sites and shutting down the operations of Universal Cranes or Smithbridge on those sites.¹⁶

...

The decision Mr Smith had made to buckle to the union pressure and have Universal Cranes agree to sign a CFMEU pattern agreement was made under very considerable economic duress. The CFMEU attack on the company had caused substantial loss for the company and the workers. Universal Cranes' equipment was sitting in the yard because the company could not get onto sites. The company's workers were 'scratching to get 40 hours a week work' with a consequence that the company was having to start putting workers off. Mr Smith's view was that he had no alternative but to sign the agreement.

The union's demand for an increase in membership amongst Universal Cranes employees also placed great pressure on the workers...

The conduct of the CFMEU in the course of its dealings with Mr Smith does not make pleasant reading. It cannot be regarded as the 'legitimate use of industrial muscle'. It cannot be regarded as bona fide negotiation – for every move by Mr Smith towards consensus was met by the introduction of an entirely fresh demand. It cannot be regarded as justified in the interests of employees – for many of the benefits generated by BERT [Building Employees Redundancy Trust]¹⁷ do not flow to the employees whose employer provides BERT with its funding. It would be kind to call the CFMEU's conduct paltering. It was nothing but a brutal and ruthless drive for complete capitulation.¹⁸

2.17 In a further case study involving CFMEU officials and West Homes Pty Ltd and Pentridge Village Pty Ltd, ACCI noted that the Royal Commission stated:

This case study illustrates the way in which officers of the CFMEU, and persons appointed by them to act on the CFMEU's behalf, misuse their powers and position in order to force builders, subcontractors and workers to enter into agreements and join a union against their will.¹⁹

2.18 The Royal Commission went on to observe that the behaviour of certain union officials in this instance was driven by self-interest rather than a concern for worker safety:

16 Australian Chamber of Commerce and Industry, *Submission 7*, p. 9. See also John Dyson Heydon AC QC, Commissioner, Royal Commission into Trade Union Governance and Corruption, *Interim Report*, p. 1413.

17 Further information on the Building Employees Redundancy Trust is available at <http://www.bert.com.au/About/About> (accessed 28 April 2015).

18 The Australian Chamber of Commerce and Industry, *Submission 7*, p. 9. See also John Dyson Heydon AC QC, Commissioner, Royal Commission into Trade Union Governance and Corruption, *Interim Report*, pp 1434–1435.

19 The Australian Chamber of Commerce and Industry, *Submission 7*, p. 10. See also John Dyson Heydon AC QC, Commissioner, Royal Commission into Trade Union Governance and Corruption, *Interim Report*, p. 1559.

That behaviour was not motivated by a concern for safety. It was motivated by a desire to control the work site and the workers on it, increase the membership base of the union, and increase the number of subcontractors bound to the CFMEU's form of enterprise bargaining agreement (the terms of which require subcontractors to make payments to Incolink and Cbus, two companies in which the CFMEU has a substantial financial interest).²⁰

2.19 The industry view of recent history in the building and construction industry was set out by ACCI:

- successive Royal Commissions finding there to be a culture of union thuggery, intimidation and lawlessness;
- [Royal Commissions] recommend reforms shepherded in via a legislative response;
- the resumption of normal standards of behaviour;
- the reforms then being wound back as a result of a subsequent change in government; and
- a reversion to union thuggery, intimidation and lawlessness.²¹

2.20 The committee notes that a number of case studies demonstrate apparent unlawful behaviour by some union officials in certain situations.

Committee view

2.21 The committee is persuaded by the evidence detailed in the interim report of the Royal Commission, and by the chronology of events set out by ACCI, that the abolition of the ABCC appears to have emboldened certain union officials to once again flout the law to achieve their aims.

Need for the extension to compulsory powers

2.22 Given the extent of unlawful union activity documented above, the FWBC's compulsory powers were seen by some submitters as essential to curbing the illegal activities of the CFMEU, upholding the law on Australian building and construction sites, and ensuring the effective functioning of the FWBC.²²

2.23 The Australian Mines and Metals Association (AMMA) stated that the current level of industrial unlawfulness was such that any loss of the FWBC's investigative powers (due to the sunset provisions) would limit the FWBC's ability to enforce current laws in the construction industry.²³

20 The Australian Chamber of Commerce and Industry, *Submission 7*, p. 10. See also John Dyson Heydon AC QC, Commissioner, Royal Commission into Trade Union Governance and Corruption, *Interim Report*, p. 1560.

21 The Australian Chamber of Commerce and Industry, *Submission 7*, pp 1–2.

22 The Australian Mines and Metals Association, *Submission 1*, pp 2–3; Master Builders Australia, *Submission 3*, pp 2–4; The Australian Industry Group, *Submission 6*, pp 5–6; The Australian Chamber of Commerce and Industry, *Submission 7*, p. 1.

23 The Australian Mines and Metals Association, *Submission 1*, pp 2–3.

2.24 The Ai Group argued that the extension of the compulsory powers was necessary because the CFMEU refused to cooperate with the FWBC:

History shows that the CFMEU will not cooperate with the Regulator unless the examination powers exist. Prior to the powers being implemented in June 2005, the CFMEU adopted a blanket policy of its officers, staff and delegates refusing to be interviewed by the Regulator, which frustrated many investigations into unlawful conduct.²⁴

2.25 The Combined Construction Unions²⁵ disputed this assertion, stating that they regularly cooperated with the FWBC with regard to the compulsory production of documents under section 712 of the *Fair Work Act 2009* (the Fair Work Act):

The construction unions routinely comply with these notices from FWBII [FWBC] requiring production of documents. There have been no prosecutions against unions or union members for failing to comply with them.²⁶

2.26 Furthermore, the ASU, the Combined Construction Unions, and UnionsWA pointed out that the extension of the FWBC's compulsory powers was an unnecessary duplication of the powers that already reside with the Fair Work Ombudsman (FWO) because the FWBC was enforcing the same set of industrial laws as the FWO.²⁷

2.27 However, one of the key points made by several submitters was that even though the FWBC and the FWO did share some powers, the additional compulsory powers of the FWBC were essential, not only because of the gravity of the issues, but because the issues were unique to the building and construction industry.²⁸

2.28 The Combined Construction Unions also noted that under section 712 of the Fair Work Act, the 'FWO currently has the power to compel the production of records or documents to assist it in investigating industrial contraventions' and that FWBC inspectors typically make use of the same power.²⁹

2.29 Noting that a failure to comply under the Fair Work Act results in a civil penalty, the Combined Construction Unions pointed out that a failure to comply with notices issued by the FWBC under the *Fair Work (Building Industry) Act 2012* (the

24 The Australian Industry Group, *Submission 6*, p. 5.

25 The submission by the Combined Construction Unions was made on behalf of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (AMWU); the Australian Workers Union (AWU); the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU); and the Construction Forestry, Mining and Energy Union (CFMEU).

26 Combined Construction Unions, *Submission 5*, p. 2.

27 Australian Municipal, Administrative, Clerical and Services Union, *Submission 2*, p. 2; UnionsWA, *Submission 4*, p. 1; Combined Construction Unions, *Submission 5*, p. 2.

28 The Australian Mines and Metals Association, *Submission 1*, p. 2; Master Builders Australia, *Submission 3*, pp 6–8; The Australian Industry Group, *Submission 6*, pp 3–5; The Australian Chamber of Commerce and Industry, *Submission 7*, pp 1–18.

29 Combined Construction Unions, *Submission 5*, p. 2.

FW(BI) Act) is a criminal offence. The Combined Construction Unions argued that the civil penalty regime has served as an adequate deterrence against non-compliance since 2009.³⁰

2.30 UnionsWA (and the Combined Construction Unions) pointed out that if the bill is rejected, the result would be that the FWBC would 'have the same powers as the FWO for the building industry' and that 'these are entirely appropriate powers for an industrial relation regulator'.³¹

2.31 The Combined Construction Unions also noted that under section 709 of the Fair Work Act both FWO and FWBC inspectors have the power to:

- inspect any work, process or object;
- interview any person;
- require a person to tell the inspector who has custody of, or access to, a record or document;
- require a person who has the custody of, or access to, a record or document to produce the record or document to the inspector either while the inspector is on the premises, or within a specified period;
- inspect, and make copies of, any record or document that is kept on the premises or is accessible from a computer that is kept on the premises; and
- take samples of any goods or substances in accordance with any procedures prescribed by the regulations.

Both FWO and FWBC inspectors would retain these powers if the bill was rejected.³²

2.32 While recognising that the FWBC and the FWO do share some powers, the committee notes that the additional powers accorded to the FWBC are necessary given the unique issues particular to the building and construction industry.

2.33 The conclusion drawn by the Combined Construction Unions was that the coercive powers were unfair, unnecessary and constituted an excessive infringement of civil liberties:

The powers and the criminal sanction behind them represent a serious incursion into the civil liberties of Australian citizens which is unwarranted in a workplace context. They are plainly not critical to the investigation and enforcement processes of the FWBII [FWBC]. The powers conferred by the FW Act [Fair Work Act] are adequate and proportionate for the purposes of industrial investigations.³³

30 Combined Construction Unions, *Submission 5*, pp 2–3.

31 UnionsWA, *Submission 4*, p. 2; see also Combined Construction Unions, *Submission 5*, p. 2.

32 Combined Construction Unions, *Submission 5*, p. 3.

33 Combined Construction Unions, *Submission 5*, p. 4.

2.34 However, the industry organisations also placed the need to extend the compulsory powers within the broader context in which the building and construction industry operates.

2.35 Noting the softening economic conditions confronting Australia, ACCI pointed out that the building and construction industry 'has a critical role to play in rebalancing the economy', particularly in terms of infrastructure development. ACCI therefore warned that the social and economic benefits of private infrastructure investment were threatened by the 'culture of industrial lawlessness that has been reported in multiple Royal Commissions'.³⁴

Committee view

2.36 The committee is of the view that the extension of the compulsory investigative powers is essential in the effort to reinstate the rule of law in the building and construction industry, and thereby encourage investment and growth in this crucial sector of the economy.

Inadequacy of the current laws

2.37 Master Builders, the Ai Group, and ACCI agreed that the extension of the FWBC's compulsory powers was vital, but emphasised that support for the bill should not be taken as an endorsement of the more limited role of the FWBC as compared to the more robust role of the proposed re-established ABCC.

2.38 The Ai Group stated that current laws regulating conduct in the construction industry were 'inadequate' and had led to 'an outbreak of unlawful industrial action and unlawful coercion on building sites by construction industry unions such as the CFMEU. The situation is worsening by the day'.³⁵

2.39 The inability of the FWBC to act as a robust industry watchdog in the manner that had previously been performed by the ABCC was of particular concern. The industry organisations identified changes in the law under which the FWBC operates as having weakened the enforcement powers of the regulator in crucial ways. Master Builders argued that the FWBC is hobbled by sections 73 and 73A of the FW(BI) Act that prevent the FWBC from instituting or continuing litigation in relation to settled matters.³⁶

2.40 The inadequacy of current laws to restrain unlawful union behaviour, and the deterioration in workplace relations in the industry following the abolition of the ABCC, were reiterated by ACCI:

Previous Royal Commissions have uncovered wilful defiance, disregard or contempt of the law by the CFMEU and there is evidence that such behaviours have not been adequately addressed by the current framework. In order for civil penalties to be an effective deterrent, the penalty levels

34 Australian Chamber of Commerce and Industry, *Submission 7*, p. 4.

35 The Australian Industry Group, *Submission 6*, p. 6.

36 Master Builders Australia, *Submission 3*, p. 3.

must be appropriately set. They are not currently serving as an effective deterrent. Since the previous Government abolished the Australian Building and Construction Commission (ABCC), we have seen an return to the sort of behaviour identified by previous Royal Commissions, such as the illegal CFMEU blockade of Melbourne's CBD, alleged secondary boycott activity against Boral simply because it was a supplier to Grocon and reports of intimidation and contractors being locked out of building sites for refusing to give in to union demands.³⁷

2.41 Further problems identified by Master Builders with regard to the FWBC include a reduction in penalties for breaches of the law and a narrowing of the definitions around unlawful behaviour under the Fair Work Act:

- the maximum level of fines that may be imposed for proven breaches has been cut by two thirds;
- the range of circumstances in which industrial action is unlawful and attracts penalties has narrowed, in that the Inspectorate enforces the flawed Fair Work Act;
- parties are no longer forbidden to apply 'undue pressure' to make, vary or terminate an agreement; and
- the definition of building work has been narrowed to exclude work performed off-site, thus limiting the ambit of the FWBC's authority.

2.42 It is noteworthy that the issues of penalties, codes, and adequate resourcing of the regulator were canvassed by the Productivity Commission *Public Infrastructure* report of May 2014. AMMA drew attention to these findings, and in particular the recommendations by the Productivity Commission that:

- the ceiling for penalties for unlawful industrial relations conduct in the construction industry be increased;
- Australian State and Territory governments consider adopting codes/guidelines for major infrastructure purchases essentially similar to the Victorian Code of Practice for the Building and Construction Industry; and
- the regulator be provided with adequate resources to give genuine and timely effect to the enforcement regime.³⁸

2.43 As noted in the preceding section, a number of submitters argued that the powers of the FWO were perfectly adequate to enforce industrial laws in the building and construction sector.

2.44 Beyond this, however, the ASU and the Combined Construction Unions expressed grave concern over what they saw as the partisan application of the current

37 Australian Chamber of Commerce and Industry, *Submission 7*, p. 5.

38 The Australian Mines and Metals Association, *Submission 1*, p. 2; see Productivity Commission, *Public Infrastructure*, May 2014, p. 33 and recommendations 13.1 and 13.2.

laws and powers in the operations of the FWBC.³⁹ The Combined Construction Unions were particularly aggrieved that the FWBC appeared to be singling out unions as the target for its enforcement operations while neglecting to pursue breaches of industrial law by employers.⁴⁰

2.45 The Combined Construction Unions drew attention to what they saw as the FWBC's failure to fulfil its mandate on behalf of employees. They argued that the function of a labour inspectorate should be consistent with Australia's international obligations as a signatory to the International Labour Organization (ILO) Convention 81—Labour Inspection. The Combined Construction Unions stated that, unlike the FWO, the FWBC did not consider that part of its function as an Inspectorate was to ensure compliance with Article 3(1)(a) of ILO Convention 81, namely:⁴¹

to secure the enforcement of the legal provisions relating to conditions of work and the protection of workers while engaged in their work, such as provisions relating to hours, wages, safety, health and welfare, the employment of children and young persons, and other connected matters, in so far as such provisions are enforceable by labour inspectors.⁴²

2.46 The Combined Construction Unions noted that as the agency responsible for investigating union activity, the FWBC had greater powers than the FWO which enforced industrial laws on behalf of employees, and that this inequitable situation offended 'against the most basic principle of equality before the law'. The Combined Construction Unions therefore accused the FWBC of abdicating its responsibilities towards employees to pursue an anti-union crusade.⁴³

Committee view

2.47 Mindful that claims of anti-union bias may serve to divert attention from the core issue of persistent union unlawfulness, the committee recognises the imperative to extend the FWBC's compulsory investigative powers as proposed in this bill.

2.48 Furthermore, noting both the clear inadequacy of the current laws to combat unlawful behaviour, and the recommendations of the Productivity Commission, the committee is persuaded that the proposed re-establishment of the ABCC as a robust industry watchdog is a vital next step following passage of this bill.

39 Australian Municipal, Administrative, Clerical and Services Union, *Submission 2*, p. 2; Combined Construction Unions, *Submission 5*, p. 4–6.

40 Combined Construction Unions, *Submission 5*, p. 4–6.

41 Combined Construction Unions, *Submission 5*, p. 4.

42 International Labour Organization, Convention 81, Part 1—Labour Inspection in Industry, Article 3(1)(a).

43 Combined Construction Unions, *Submission 5*, p. 4–6.

The reasonable nature of the compulsory powers

2.49 The Ai Group, ACCI, and Master Builders emphasised that the FWBC's compulsory powers are not unique.⁴⁴ Master Builders noted that the powers (and those of the proposed ABCC) comply with 'the administrative law values of fairness, lawfulness, rationality, transparency and efficiency'.⁴⁵

2.50 The Ai Group also drew attention to the 'very substantial protections' attending on the use of the examinations powers, namely:

- A Presidential Member of the Administrative Appeals Tribunal must issue an examination notice before the Director is able to use the examination powers;
- The Commonwealth Ombudsman must monitor and review the exercise of the examination powers, including:
 - Receiving a copy of all examination notices;
 - Receiving a report of every examination;
 - Receiving a video recording of every examination; and
 - Receiving a transcript of every examination.
- The Commonwealth Ombudsman is required to report to Parliament annually on the use of the examination powers. In each annual report since this requirement was introduced, the Commonwealth Ombudsman has reported that all examinations have been conducted in accordance with legislative requirements and best practice principles;
- A person may be represented at an examination, if he or she chooses;
- An examination must not take place until at least 14 days after the notice is given to the person;
- A person who attends an examination is entitled to be paid fees and allowances for reasonable expenses (including legal expenses).⁴⁶

2.51 Furthermore, Master Builders noted 'the FWBC does not have the power to prosecute a person for failing to attend an examination. The Director has only the capacity to refer a matter of this kind to the Commonwealth Director of Public Prosecutions'.⁴⁷

2.52 Finally, ACCI noted the recommendation in the Transition to Fair Work Australia for the Building and Construction Industry report by the Hon. Murray Wilcox QC (the Wilcox report) was for the compulsory powers of the FWBC to

44 Master Builders Australia, *Submission 3*, pp 5–6; The Australian Industry Group, *Submission 6*, p. 4; Australian Chamber of Commerce and Industry, *Submission 7*, p. 16.

45 Master Builders Australia, *Submission 3*, pp 5–6.

46 The Australian Industry Group, *Submission 6*, pp 4–5.

47 Master Builders Australia, *Submission 3*, pp 8–9.

sunset after five years.⁴⁸ However, the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act 2012* provided that the compulsory powers sunset after three years.⁴⁹ ACCI pointed out that extending the compulsory powers for a further two years was entirely reasonable and would merely bring the law into line with the original recommendation.⁵⁰

2.53 By contrast, the Combined Construction Unions argued that the position of those using the Wilcox report to support the extension of the compulsory powers of the FWBC beyond 2015 misunderstood the basic finding of that report:

The argument that the Wilcox Inquiry supports the extension of the life of the coercive powers beyond 2015 completely misapprehends the most fundamental conclusion of that review. Ultimately, the very first recommendation of the Wilcox Inquiry was that there should be no separate agency like the ABCC/FWBII and by extension no separate powers, but rather that the operations of that body be absorbed into the FWO.⁵¹

2.54 The Combined Construction Unions were of the view that the Wilcox report only envisaged 'some temporary short term focus on the construction industry' conducted by the FWO.⁵²

2.55 Furthermore, the ASU and the Combined Construction Unions disagreed with the basic premise put forward by the industry organisations that the compulsory powers were intrinsically reasonable. Both the ASU and the Combined Construction Unions argued that the FWBC's compulsory powers amounted to punitive discrimination against a particular subset of the workforce.⁵³

2.56 The unions supported this claim by drawing a distinction between the enforcement of industrial laws to which civil penalties overwhelmingly apply, and the enforcement of criminal laws in relation to matters such as intimidation, blackmail, and offences under the *Corporations Act 2001*. The Combined Construction Unions pointed out that neither the FWO nor the FWBC 'has any role in enforcing criminal laws'.⁵⁴ The ASU made the further point that laws are already in place to deal with criminal behaviour:

Workers in the building and construction industry should be subject to the same industrial laws as apply to other workers. This is consistent with the

48 The Hon. Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction Industry, Report*, Commonwealth of Australia, 31 March 2009, Recommendation 3.

49 *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act 2012*, section 46.

50 The Australian Chamber of Commerce and Industry, *Submission 7*, p. 18.

51 Combined Construction Unions, *Submission 5*, p. 5.

52 Combined Construction Unions, *Submission 5*, p. 6.

53 Australian Municipal, Administrative, Clerical and Services Union, *Submission 2*, p. 2; Combined Construction Unions, *Submission 5*, pp 1–6.

54 Combined Construction Unions, *Submission 5*, p. 2.

fundamental principle of equality of all persons before the law. There are already established laws to deal with criminal behaviour. To subject any group of workers or industry to special more punitive laws is unnecessary and discriminatory. The ASU is opposed to coercive powers that impinge upon the civil liberties and rights of workers.⁵⁵

2.57 Noting that the 'power to issue coercive notices in construction-related industrial matters, supported by a criminal sanction for non-compliance, has existed since the introduction of the *Building and Construction Industry Improvement Act 2005*', the Combined Construction Unions concluded:

The power, and the criminal sanction which attaches to it, are excessive, unnecessary and inconsistent with internationally recognised labour standards and the industrial norms of a modern democracy.⁵⁶

2.58 The Department of Employment (the department) outlined its view of the history behind the introduction of the compulsory information gathering powers. The department noted:

The powers were first given to the Secretary of the then Department of Employment and Workplace Relations in 2004 and then to the Australian Building and Construction Commissioner in 2005 and most recently the Director of the Fair Work Building Industry Inspectorate in 2012. The powers being extended by the Bill have existed in legislation introduced by both Coalition and Labor Governments.⁵⁷

2.59 The department also addressed the 'ongoing necessity of the compulsory information gathering powers' with reference to the Wilcox report which stated:

It is understandable that workers in the building industry resent being subjected to an interrogation process, that does not apply to other workers, designed to extract from them information for use in penalty proceedings against their workmates and/or union. I sympathise with that feeling and would gladly recommend against grant of the power. However, that would not be a responsible course. I am satisfied there is still such a level of industrial unlawfulness in the building and construction industry, especially in Victoria and Western Australia, that it would be inadvisable not to empower the [regulator] to undertake compulsory interrogation. The reality is that, without such a power, some types of contravention would be almost impossible to prove.⁵⁸

2.60 However, the department also acknowledged the need to re-assess the powers, noting that the Wilcox report had anticipated that circumstances within the industry could change:

55 Australian Municipal, Administrative, Clerical and Services Union, *Submission 2*, p. 2.

56 Combined Construction Unions, *Submission 5*, p. 1.

57 Australian Government Department of Employment, *Submission 8*, p. 4.

58 The Hon. Murray Wilcox QC, Transition to Fair Work Australia for the Building and Construction Industry, *Report*, Commonwealth of Australia, 31 March 2009, p. 3 in Australian Government Department of Employment, *Submission 8*, p. 4.

...it seems to me, that any tough new regulator in the building and construction industry will need a power of coercive interrogation; at least under present conditions.

However, the position may change. Even some of the employer associations concede it may not always be necessary for the regulator to have a coercive interrogation power. They suggest it may be desirable to review the situation in (say) five years and, for that purpose, impose a sunset clause on the relevant part of the new legislation. I think there is merit in this.⁵⁹

2.61 The department further noted that the previous government's adoption of the three-year sunset provision with regard to the compulsory information gathering powers 'reflected the fact that these powers had already been in operation in respect of the building industry since the time of the Building Industry Taskforce, which operated from October 2002 to October 2005'.⁶⁰

2.62 However, the department also pointed out that the intention was not that the powers should necessarily cease upon sunset, but rather that the powers would be subject to review prior to the expiration of the sunset period. Accordingly, the department noted:

In developing the Bills currently before the Senate to re-establish the Australian Building and Construction Commission, careful consideration was given to the ongoing need for the powers. The Government considered that, given there continues to be a culture of fear of reprisal and silence, and that lawlessness, intimidation and thuggery continue to plague the sector, it would be irresponsible not to retain the powers.⁶¹

2.63 Finally, the committee draws attention to the broader context within which the compulsory powers reside. Subsection 53(2) of the FW(BI) Act provides a use and derivative use immunity. As noted in chapter one, this means that information, answers or documents given or produced (either directly or indirectly) under an examination notice is not admissible in evidence against the person except for proceedings relating to compliance with the examination notice itself.

Committee view

2.64 The committee is of the view that the extension of the FWBC's powers is a measured and reasonable response to the unique circumstances confronting any regulator in the building and construction industry. The committee is not persuaded by the arguments that extending the measures is excessive.

59 The Hon. Murray Wilcox QC, Transition to Fair Work Australia for the Building and Construction Industry, *Report*, Commonwealth of Australia, 31 March 2009, paragraphs 5.109–5.110 in Australian Government Department of Employment, *Submission 8*, p. 5.

60 Australian Government Department of Employment, *Submission 8*, p. 5.

61 Australian Government Department of Employment, *Submission 8*, p. 5.

Benefits to witnesses of the compulsory powers

2.65 In addition to all the economic and social benefits outlined in preceding sections emanating from the ability to robustly enforce the rule of law in the building and construction industry, the bill also serves a specific purpose of protecting witnesses from union harassment. The beneficial role played by the compulsory powers in affording some level of protection to witnesses within this industry was emphasised by the Ai Group and Master Builders, with Ai Group noting:

Many company witnesses prefer to be the subject of a compulsory examination by the Regulator to reduce union coercion and intimidation against them for giving evidence.⁶²

2.66 The committee also notes that Mr Nigel Hadgkiss, Director of FWBC, has stated that the power to compel the physical attendance of witnesses at a nominated place for questioning by the FWBC was necessary because some witnesses did not want to be seen to be cooperating with the FWBC for fear of union reprisals.⁶³

2.67 The Combined Construction Unions disagreed with the assertion advanced by Mr Hadgkiss. They argued that employers in the sector had never shown any 'fear or hesitation' in dealing with unions and opposing union policies and that there was 'no reason why the situation would be any different for employer engagement with FWBII'.⁶⁴

2.68 Furthermore, even if the rationale for the protection of witnesses was conceded, the Combined Construction Unions argued that witnesses could deal with the FWBC on a confidential basis, or if required to appear in court, a suitable cover of compulsion could be provided for witnesses by use of a subpoena.⁶⁵

Conclusions

2.69 Evidence of persistent unlawfulness perpetrated by certain unions operating in the building and construction industry is a matter this committee takes extremely seriously. The building and construction industry is a crucial component of the Australian economy and the re-establishment of the rule of law in this sector is essential in securing private sector investment, the efficient allocation of public sector infrastructure, and a safe working environment for all those employed in the industry.

2.70 The allegations of union thuggery and intimidation that continue to plague this critical sector of the economy are deeply troubling. The committee is therefore not persuaded by the fear campaign run by the unions in this sector that extending the powers for a further two years is unnecessary and excessive. Rather, the committee remains firm in its view that these matters must be confronted and that the cycle of

62 The Australian Industry Group, *Submission 6*, p. 5; see also Master Builders Australia, *Submission 3*, p. 8.

63 Nigel Hadgkiss in Joe Kelly, Power needed to curb CFMEU, *The Australian*, 20 March 2015, p. 1.

64 Combined Construction Unions, *Submission 5*, p. 3.

65 Combined Construction Unions, *Submission 5*, p. 3.

unlawfulness must be broken. A failure to tackle these matters threatens grave damage to both the industry and the wider economy.

2.71 The committee has no doubt that the extension of the compulsory investigative powers is essential to protect those witnesses trying to do the right thing in the building and construction industry from further victimisation. As reflected in the committee's report, it has long been recognised, particularly in the building and construction industry, that the fear of reprisal effectively prevents people from speaking out. The committee urges all senators to heed the vulnerable position in which many witnesses find themselves and give this particular matter the utmost consideration when making a decision on this bill. Noting that governments of all persuasions have acknowledged the need for a power that enables people to speak out without fear of reprisal, it is clear to the committee that the measures contained in this bill are more than warranted in the circumstances.

2.72 The committee therefore concludes that these powers are not only necessary in the pursuit of a legitimate objective, but are a measured and proportionate response to the flagrant disregard for the law exhibited all too frequently by certain unions in this vital industry. The committee considers the bill should be passed without amendment.

Recommendation 1

2.73 The committee recommends that the Senate pass the bill.

Senator Bridget McKenzie

Chair

LABOR SENATORS' DISSENTING REPORT

Key Issues

The use of special coercive powers in the building industry are unnecessary

1.1 If this Bill is rejected, from 1 June 2015, Fair Work Building Industry Inspectorate (FWBII) inspectors would have the same powers in respect of building matters as those available to inspectors of the Fair Work Ombudsman (FWO) under the Fair Work Act (FWA).¹ 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.

1.2 We note that the FWBII's coercive notices have only been relied on four times in the 2013-14 period and twice in the period 2012-13² and are concerned that this does not support the Director's contention that the power is necessary. Labor Senators therefore continue to remind the Senate that no evidence exists to demonstrate that the powers currently conferred by the Fair Work Act are anything but adequate and proportionate for the purposes of industrial investigations.

The Government has failed to adequately consult

1.3 The former Labor Government abolished the draconian Australian Building and Construction and established the Fair Work Building Inspectorate.

1.4 In establishing the new body, Labor acted on our election commitment to consult widely, and as such appointed the respected former Justice, Murray Wilcox QC, to undertake consultation and prepare a report on matters related to the creation of a Specialist Division of the Inspectorate of Fair Work Australia, the report of which was presented to Government in 2009. The resulting Bill which gave effect to Mr Wilcox's principle recommendations, was legislated in 2012.

1.5 It is true as stated in the Chair's report that one of Mr Wilcox's recommendations was to retain coercive powers. We note that Mr Wilcox expressly recommended the powers be subject to a sunset clause and that the retention of those powers be the subject of a review. A sunset clause, by its nature, is placed in legislation to require the Government to justify with evidence the need to extend. The Government has not conducted any such review. A Senate Committee inquiry undertaken 'on the papers' does not suffice.

¹ see s. 59C of the Fair Work (Building Industry) (FWBI) Act 2012

² Fair Work Building Industry Inspectorate (FWBII) Annual Report 2013-14

Recommendation

1.6 Until the Government conducts an independent review into the extension of the sunset clause we will not support the extension of coercive powers. Labor Senators recommend that the Senate oppose the Bill.

Senator Sue Lines

Deputy Chair

AUSTRALIAN GREENS' DISSENT REPORT

Introduction

1.1 There is no justification for the coercive powers that cover the building industry to be extended for another two years.

1.2 It is on this basis that the Greens are recommending that the *Construction Industry Amendment (Protecting Witnesses) Bill 2015* (bill) is not passed.

1.3 The current powers of inspectors operating under the Fair Work Act 2009 are adequate to allow for satisfactory investigations. These inspectors are able to enforce industrial laws. The Fair Work Ombudsman, as an industrial regulator, has the necessary powers to be an effective body for the industry.

1.4 The Greens are opposed to the use of coercive powers in the industrial context. These powers and the associated criminal sanctions have no place in a democratic society. There is no justification for introducing this measure which allows certain workers to be secretly interrogated. These measures are inconsistent with international labour standards.

1.5 Workers in the construction industry should come under the same laws as all other workers. If this bill is passed it will mean that workers could be subject to arbitrary interrogations. This is a form of harassment and intimidation that runs counter to the norms of a fair society.

1.6 It is relevant to consider where support for this legislation is coming from. Vigorous support is coming from those who profit enormously in the construction industry. As many construction company owners mistakenly equate union activity with reduced profitability, they have in turn supported coercive powers executed by a publicly funded prosecutor of unions and workers.

1.7 The regulation of the construction industry should come under the same regime as that which covers all workers and their employers.

1.8 As the Combined Construction Unions note in their submission, the Wilcox Inquiry did not support the extension of coercive powers beyond 2015. As the CCU states:

...Wilcox was satisfied that the Parliament, in introducing the Fair Work Act, had recently considered what the federal labour inspectorate should look like and what the necessary and appropriate powers of such a body would be.¹

1 Combined Construction Unions, *Submission 5*, p.7.

1.9 There should be no separate agency and no separate powers in the form outlined in this legislation.

Recommendation

1.10 The Greens recommend that the Construction Industry Amendment (Protecting Witnesses) Bill 2015 is not passed.

**Senator Lee Rhiannon
Australian Greens**

APPENDIX 1

Submissions received by the Committee

Submissions:

- 1 Australian Mines and Metals Association
- 2 Australian Services Union
- 3 Master Builders Australia
- 4 UnionsWA
- 5 Combined Construction Unions
- 6 Australian Industry Group and Australian Constructors Association
- 7 Australian Chamber of Commerce & Industry
- 8 Department of Employment