

CHAPTER 1

Introduction and Background

Reference

1.1 On 14 November 2013, the Senate referred the provisions of the Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013, to the Senate Education and Employment Committee for inquiry and report by 2 December 2013.¹

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 18 individuals and organisations, as listed in Appendix 1. A public hearing was held in Melbourne on 26 November 2013. The witness list for that hearing is available in Appendix 2.

Acknowledgement

1.3 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.

Note on references

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

Background to the Bill

1.5 The Building and Construction Industry (Improving Productivity) Bill 2013 proposes to regulate certain conduct of building industry participants who perform building work.

1.6 The bill would replace the Office of the Fair Work Building Industry Inspectorate with the re-established Australian Building and Construction Commission. The bill governs the appointments and functions of the Commission as well as those of the Office of the Federal Safety Commissioner.

Legislative History

1.7 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

1 *Journals of the Senate*, 14 November 2013, p. 123 (44th Parliament).

report of February 2012.² 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.

1.8 In 2003 the Royal Commission into the Building and Construction Industry released its reports and findings.³ 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.⁴

1.9 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. 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.

1.10 On 17 June 2009 the 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.

Findings of the Committee in 2012

1.11 The committee considered the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2012 that abolished the Australian Building and Construction Commission in its 2012 report and made a series of recommendations to amend the bill.

1.12 Coalition Senators provided a dissenting report which concluded with a single recommendation expressing opposition to the bill and a commitment to the re-establishment of the Australian Building and Construction Commission.

Purpose of the Bill

1.13 The bill re-establishes the Australian Building and Construction Industry Commission (ABCC) that was abolished under the 2012 Act and replaced by the Office of Fair Work Building Industry Inspectorate (FWBII). The bill proposes that the FWBII would continue in existence under the name of the ABCC. Chapter 2 would also regulate the appointment and functions of the Australian Building and Construction Industry Commissioner (ABC Commissioner).

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

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

3 *Explanatory Memorandum*, Statement of Compatibility with Human Rights, p. 50.

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

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

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

The Building Code

1.16 Chapter 3 of the bill would provide the Minister with the power to issue a Building Code. The current Building Code was issued by Legislative Instrument under the *Fair Work (Building Industry) Act 2012* and commenced on 1 February 2013. This bill adds a provision that building industry participants may be directed to report to the ABC Commissioner on their compliance with the Code.

Unlawful Industrial Action

1.17 Chapter 5 of the bill prohibits unlawful industrial action. Unlawful industrial action includes bans on working, employees failing to attend work and employers locking out employees.⁵ This Chapter would apply only if the unlawful action or unlawful picket has a connection to a constitutionally-covered entity. Any person would be able to apply for an injunction to restrain a person from organising or engaging in unlawful industrial action or an unlawful picket in relation to building work.⁶

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

Coercion, discrimination and unenforceable agreements

1.19 Chapter 6 would prohibit action that:

- intends to coerce a person to employ or engage individual employees or independent contractors;
- intends to coerce a person to assign particular duties or responsibilities to people or contractors;

5 Building and Construction Industry (Improving Productivity) Bill 2013, clause 44.

6 Explanatory Memorandum, Building and Construction Industry (Improving Productivity) Bill 2013, p. 3.

- intends to make an employee or employer nominate a particular superannuation fund.

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

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

Obtaining Information

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

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

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

1.24 The Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 is consequential to the Building and Construction Industry (Improving Productivity) Bill 2013. The bill would wholly repeal the Fair Work (Building Industry) Act 2012 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.

1.25 The bill provides administrative arrangements relating to the transition from the institutions, functions and powers contained in the Fair Work (Building Industry) Act 2012 to those proposed in the Building and Construction Industry (Improving Productivity) Bill 2013.

Compatibility with human rights

Building and Construction Industry (Improving Productivity) Bill 2013

1.26 The explanatory memorandum states that the Building and Construction Industry (Improving Productivity) Bill 2013 is compatible with the human rights and freedoms recognised or declared in the international instruments listed in the *Human Rights (Parliamentary Scrutiny) Act 2011*.⁷

1.27 A number of human rights are engaged by the bill, including: the right to freedom of association, the right to just and favourable conditions of work, the right to a fair trial, the right to peaceful assembly, the right to freedom of expression, and the right to privacy and reputation.⁸ The explanatory memorandum submits that the measures contained in the bill are a reasonable and proportionate response to the findings of the 2003 Royal Commission and 'recent evidence of lawlessness in the building and construction industry'.⁹

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

1.28 The explanatory memorandum states that the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 is compatible with the human rights and freedoms recognised or declared in the international instruments listed in the *Human Rights (Parliamentary Scrutiny) Act 2011*.¹⁰

1.29 The bill engages the right to privacy. For example, the bill contains provisions to protect privacy and also to enables the transfer of information relating to current investigations from the current regulator to the ABC Commission, to ensure continuity in enforcement activities. The explanatory memorandum concludes that the bill is consistent with human rights because 'to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate'.¹¹

Consideration by legislative scrutiny and human rights committees

1.30 The bills have not yet been considered by the Parliamentary Joint Committee on Human Rights or the Senate Standing Committee for the Scrutiny of Bills.

7 *Explanatory Memorandum*, Building and Construction Industry (Improving Productivity) Bill 2013, p. 50.

8 *Explanatory Memorandum*, Building and Construction Industry (Improving Productivity) Bill 2013, p. 51.

9 *Explanatory Memorandum*, Building and Construction Industry (Improving Productivity) Bill 2013, p. 51.

10 *Explanatory Memorandum*, Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013, p. 10.

11 *Explanatory Memorandum*, Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013, p. 11.