AUSTRALIAN MANUFACTURING WORKERS' UNION

AMWU

Submission to the Senate Standing Committee on Education and Employment

Inquiry into the

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

November 2013

AMWU

National Research Centre

About the Australian Manufacturing Workers' Union

1. The Australian Manufacturing Workers' Union (AMWU) is registered as the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union". The AMWU represents around 100,000 members working across major sectors of the Australian economy, including in the manufacturing sectors of vehicle building and parts supply, engineering, printing and paper products and food manufacture. Our members are engaged in maintenance services work across all industry sectors. We cover many employees throughout the resources sector, mining, aviation, aerospace and building and construction industries. We also cover members in the technical and supervisory occupations across diverse industries including food technology and construction. The AMWU has members at all skills and classifications from entry level to degree.
2. The AMWU's purpose is to improve member's entitlements and conditions at work, including supporting wage increases, reasonable and social hours of work and protecting minimum award standards. In its history the union has campaigned for many employee entitlements that are now a feature of Australian workplaces, including occupational health and safety protections, annual leave, long service leave, paid public holidays, parental leave, penalty and overtime rates and loadings, and superannuation.

Executive Summary

3. The Building and Construction Industry (Improving Productivity) Bill 2013 and Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 should not be passed by the Parliament.
4. The ACTU's submissions cover the primary reasons why the bill should not be passed. This submission makes additional comments in support of the ACTU submission.
5. There should not be different laws for different employees based on where they work. Commonwealth industrial laws should apply to all citizens, regardless of where they live and work in Australia. Just as there should not be different Commonwealth industrial penalties for people living in Sydney as compared to Perth, there shouldn't be different punitive industrial laws for people working on a construction site as compared to in a bank.
6. Workplace laws must have workplace, health and safety and the safety of the public as a primary concern. The bill's negative impact on workplace, health and safety alone is a reason for it to be rejected by the parliament.
7. Not only should the bill not pass, it should not pass in its current form where it proposes to make Manufacturing employees subject to the new laws. The extension of the proposed remit of the Australian Building and Construction Commission (ABCC) to the Manufacturing industry was not an explicit part of the Coalition's election commitment and is a breach of the election commitment.
8. Fundamental to our rights as citizens is the right to have allegations of unlawful behaviour proven by the police or enforcement agency and the right to remain silent. These rights should be upheld by the Parliament for all Australians regardless of whether they choose to work for or in the building industry.
9. Prosecutors should satisfy a court that an individual is suspected of breaching the law and that a warrant is necessary for special coercive investigative powers.

10. The power to override someone's right to remain silent and protect personal information should remain with courts and independent judges who are impartial to the investigation. Powers to coerce people to cooperate with an investigation like those reserved for suspected terrorists should not apply to employees for workplace disputes, without any safeguards and oversight from the court system.
11. The claim that there is a 9.4% productivity improvement in the building industry (as a result of the existence of the Australian Building and Construction Commission) has been proven to be wrong.
12. Given that only 2 of the Cole Royal Commissin's 490 findings of alleged "unlawful conduct" resulted in prosecutions,[1] there is no case for the re-establishment of the ABCC.
13. With the arguments of productivity and unlawful behaviour removed, there is no argument left for the ABCC. The Government should make a case for why new laws are needed beyond what is provided by the recently enacted *Fair Work (Building Industry) Act* 2012.

[1] 392 findings of unlawful conduct in the public report and 98 findings in the "secret" report. See Senate Employment, Workplace Relations and Education References Committee 25/5/04 Hansard page 81 and Letter from the Deputy Prime Minister to CFMEU dates 13 January 2009 attached as Appendix 1 to Combined Construction Unions submission to Senate Education, Employment and Workplace Relations Legislation Committee inquiry into Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011.

Introduction

14. The AMWU makes the following submissions to the Senate Standing Committee inquiry opposing the passing of the Building and Construction Industry (Improving Productivity) Bill 2013 and Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013.
15. As an affiliate of the Australian Council of Trade Unions' submissions (ACTU), these submissions are in addition to and wholly supportive of the ACTU.
16. The AMWU continues to rely on submissions made by the Combined Construction Unions to Senate Education, Employment and Workplace Relations Legislation Committee inquiry into the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011 and the attachments to that submission.
17. This submission will address:
    a. Weakening Occupational Health and Safety Precautions;
    b. Excluding the manufacturing industry from the ABCC regime;
    c. The ABCC history of targeting employees and substantially ignoring employer's who do not provide proper entitlements to employees;
    d. False claims that the ABCC improves productivity;
    e. The right to silence;
    f. Rendering employment contracts void;

Weakening Workplace Health and Safety Precautions

18. The need for employees to be able to stop work if there is a potential risk of danger in the workplace is critical to minimising injuries and fatalities. The risk of danger on a building site is well known and accepted.
19. Under the bills provisions, any departure from ordinary work practices as a result of an WH&S risk can expose those taking the action to a pecuniary penalty. Employees are therefore faced with the impossible dilemma of having to assess and balance an occupational health and

safety issue against the prospect of large fines if they take building industrial action in response to any risk.

20. If an employee does take action in response to risk, they then must bear the burden of proving they had a reasonable concern of a workplace health and safety risk and that they did not unreasonably fail to comply with a direction of their employer to perform other work that was safe.[2] This requirement for an employee to weigh up and establish evidence in their mind at the point where a workplace, health and safety hazard presents itself on a building and construction site goes against the public policy of ensuring that workplaces, particularly building sites are safe.
21. The narrowness of the exclusion also does not allow for employees on a building site to take industrial action if they perceive a risk not to themselves, but to the general public. The exception is only for a concern about an "imminent risk to his or her health and safety" which would possibly exclude a possible risk to the public's or future building occupant's health or safety.[3]

Including manufacturing industry supplying goods to the Building Industry

22. The Coalition's election commitment was to re-establish the ABCC, not to establish a new commission that will extend to businesses supplying goods to the building and construction industry.
23. Clause 6(1)(e), which was not present in the 2005 Act, appears to extend to the supply of all goods to the building and construction industry. Clause 6(1)(e) includes "*transporting or supplying goods, to be used in work covered by paragraph (a), (b), (c), or (d), directly to building sites (including any resources platform) where that work is being or may be performed.*"

---

[2] Clause 7(4)
[3] Clause 7(2)(c)

24. The explanatory memorandum says in reference to clause 6(1)(e) that "it is not intended to pick up the manufacture of those goods."[4] On an ordinary reading of the words in the proposed bill, manufacturing industries and potentially other industries supplying goods to the building and construction industry would be included in the definition.
25. The Fair Work (Building Industry) Act 2012 actually amended the equivalent section 6(1)(d)(iv) to remove the words "off-site" so that prefabrication which is done off-site in a manufacturing plant is not included to clarify the intent of the laws to only apply on building and construction sites.
26. Manufacturers of building products should not have their rights at work removed because they are supplying to the non-residential building and construction industry.
27. **Recommendation:**
28. That the Senate amend the bill to insert a clause to make clear that the building work does not include any manufacture of goods.

Targeting employees and inherent bias

29. In 2009-10 the focus of the ABCC was on targeting employee's rights. 61% of cases commenced in 2009-10 were allegations of unlawful industrial action and 26% were right of entry prosecutions. A total of 87 % of the ABCC 's prosecutions in that year were aimed at minimising the ability for employees to engage in industrial action or for unions to access workplaces to provide advice or assistance to employees.[5]
30. The Australian Industrial Relations Commission was heavily critical of the way in which the ABCC conducted prosecutions when it was first established. The court made the following comment which was indicative:

    "'....., the manner in which the investigation and interviews appear to have been

[4] Explanatory Memorandum page 6 paragraph 12
[5] Senate Standing Committee on Education Employment and Workplace Relations Questions on Notice Additional Estimates 2010-2011 Question No.EW0675_11

conducted and recorded by ABCC Inspectors was to cast Mr McLoughlin in the worst possible light, rather than to provide full evidence as to the manner in which Mr McLoughlin exercised his right of entry on to sites.'[6]

31. The Federal Court of Australia has also cast serious doubt on the objectivity of the ABCC making reference to it 'casting a blind eye' to employer illegality. The Court when on:-

"The promotion of industrial harmony and ensuring of lawfulness of conduct of those engaged in the industry of building and construction is extremely important, but it is one which requires an even-handed investigation and an even-handed view as to the resort to civil or criminal proceedings, and that seems very much to be missing in this case."[7]

32. In this case, Acting Chief Justice Spender described a case brought by an ABC Inspector against the Communications Electrical Plumbing Union, the Queensland branch of the Plumbers and Gasfitters Employees' Union and the Secretary of the Queensland branch as 'misconceived, . . . completely without merit and should not have been brought.' Rather than bringing proceedings against the three defendants, SpenderAC J stated that the ABC Inspector should have brought proceedings against the plumbing contractor company, Underground, as well as its managing director (described by Spender J as 'a foul-mouthed cowboy') and possibly another director. The corporate arrangement entered into by Underground whereby workers were categorised as independent contractors, instead of employees, was 'a sham, a bogus arrangement' intended to avoid the requirements of the certified agreement.[8]

33. In another matter, after listening to the ABCC inspector's interview with an employee, the Federal Court described the interviewer's approach as biased against the union and the tone of the inspector to be 'avidly anti-union'.[9]

---

[6] *Martino* RE 2007/2179
[7] *Lovewell v O'Carroll*, (unreported, QUD 427/2007, transcript, 8 October 2008) at 88 per Spender ACJ at 89
[8] Summary taken from a paper by Williams G and McGarrity N, "The investigative powers of the Australian Building and Construction Commission" (2008) 21 Australian Journalist of Labour Law 244 at p257.
[9] *Duffy v. CFMEU* VID 687 of 2007, 28 November 2008.

34. For a period of time, the ABCC had a policy of not pursuing employers who were not paying employee entitlements.

35. The proposed bill facilitates further political prescriptions including, an ability for the Minister to provide direction to the Commissioner "specifying the manner in which the ABC Commissioner must the powers of perform the functions of the ABC Commissioner under this Act."[10] Political directions from a Government to an agency to focus on targeting a class or category of employee and their activities should not be included in any proposed law.

Productivity Claims

36. The ACTU's submission canvasses this issue in detail and references many of the credible assessments on the public record which discredit the Econtech analysis relied upon by the misleading claim that there is a 9.4% productivity. Even the former Australian Building and Construction Commission refused to stand by the economic modelling which purported to show the 9.4% productivity improvement.[11] The fact that the agency subsequently took the documents down from the website evidence their lack of credibility.

37. The parliament must inquire into this claim which is made in the Minister's second reading speech in detail. The title of the bill in brackets "improved productivity" underlines that this figure is the fundamental basis upon which the laws are justified.

38. The figure is reference again the Coalition's election commitment document, which is available as part of the Parliamentary Library's collection of historical party documents and still present on the Liberal Party's website and used as the basis and justification for the laws.

---

[10] Clause 17 of the bill.

[11] ABCC Commissioner Leigh John responding to question from Senator Cameron in Senate Estimates on 20 October 2010. Further analysis of the economic modelling http://www.politifact.com.au/truth-o-meter/statements/2013/aug/29/tony-abbott/bricks-and-rorts-reform-case-built-sandy-soil/

39. Without this figure there is little justification for the election commitment and should be dropped by any sensible government presented with the facts.[12]

Powers to override the right to silence

40. The ABCC investigates industrial activity such as protected industrial action and union right of entry into workplaces to provide support to employees. These are not activities akin to criminal activities or suspected terrorist activities which may warrant the suspension of a person's right to remain silence. Even for these special cases, a warrant is required.
41. It is accepted that for serious investigations such as those conducted by police for crimes, the police must go to the court to obtain a warrant and establish the need for the warrant. There would not be a police force established which can issue its own warrants for special coercive investigative powers.
42. This bill attempts to provide powers reserved for Judges to the same body that is doing the investigation. A body, which from the history on the public record as outlined above we know is biased and centred around targeting employee industrial action and union right of entry.

Powers to render workplace rights unenforceable

43. Agreements reached by an employee and employers under the proposed laws would be rendered null and void if the employer believes that the entitlements are "standard employment conditions for building employees."
44. The bill proposes at clause 59 that an enterprise agreement will be unenforceable if it is "entered into with the intention of securing standard employment conditions for building employees in respect of building work that they carry out at a particular building site or sites."

---

[12] http://www.liberal.org.au/improving-fair-work-laws (accessed 22 November 2013) http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;orderBy=customrank;page=0;query=The%20Coalition's%20policy%20to%20improve%20the%20fair%20work%20laws%20Dataset%3Apartypol;rec=0;resCount=Default

45. Employees who might be unfortunate enough not to be on a collective agreement, and who are forced to negotiate individual common law contracts to get above award conditions could have the employer unilaterally decide not to honour the agreement. The effect of the clause 59 is to allow employers to dishonour contracts of employment which are entered into with employees above award rates. An employer simply has to form the view that the employee was intending to secure standard employment conditions.
46. It would be hard to argue that any employee in a workplace who is forced to negotiate their pay does not have any eye to what is a standard employment condition for their industry. What becomes industry standards over time are a result of employees negotiating with their employers, whether that is through Commonwealth industrial instruments or other agreements they should not be unenforceable simply because a person wants to have conditions that are industry standard.

Conclusion

47. The AMWU opposes the bill in its entirety. The bill should be opposed as it negatively impacts on workplace, health and safety of employees and the public. It reduces the rights of employees in a particular industry to those of a suspected terrorist without any oversight from a court. The bill's coercive powers given to the ABCC are not justified, and the extension of the ABCC's coercive power's to the manufacturers who are supplying the building and construction industry is definitely not justified.
48. The key arguments for the ABCC have been debunked and there should be an evidence based approach to proposals to further amend the laws which were only recently amended in 2012.