

FOLEY'S | LIST

REINFORCING THE BUILDING BLOCKS

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Reinforcing the building blocks

A move towards stronger regulation

The *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) (Bill),¹ introduced into Parliament on 14 November 2013, contains far-reaching objectives, including the provision of an improved workplace-relations framework to ensure that building work is carried out fairly, efficiently and productively for the benefit of all building industry participants and the Australian economy as a whole (cl 3). The Bill seeks to re-establish the position of the Australian Building and Construction Commissioner (ABC Commissioner), which was abolished in 2012, and aims to further encourage genuine bargaining at the workplace level.²

The Bill is the legislative pillar of the four-pillar approach to stronger construction industry regulation, the others being funding and staffing an investigatory and

educative industry authority, the requirement that tenderers meet code requirements in the Commonwealth's own procurement of construction services,³ and the Royal Commission into Trade Union Governance and Corruption.⁴

BACKGROUND

The ABC Commissioner was originally established by the *Building and Construction Industry Improvement Act 2005* (Cth) (BCII Act), implemented by the Howard government as a response to the 2003 Royal Commission into the Building and Construction Industry.

In 2012 the ABC Commissioner was abolished by the *Fair Work (Building Industry) Act 2012* (Cth) (FWBI Act) and replaced with the Office of the Fair Work Building Industry Inspectorate, which operated as Fair Work Building and Construction (FWBC).

The *Building and Construction Industry (Improving Productivity) Bill 2013* will

re-establish the Australian Building and Construction Commissioner and signal a return to stronger regulation of the construction industry.

By Stuart Kollmorgen and Glen Pauline

The provisions are drafted broadly and appear to be a response to a number of recent instances of disruptive picketing by construction industry unions.

Although the construction industry-specific regulation was maintained, FWBC had reduced powers compared to those of the ABC Commissioner, and the FWBI Act substantially lowered the penalties applicable to building industry participants for breaches of industrial laws and limited the circumstances in which unlawful industrial action would attract penalties.

KEY PROVISIONS

Definition of “building work” broadened

The definition of “building work” under the Bill has been expanded to include the supply or transportation of goods to building sites (including any offshore resources platforms) where “work is being or may be performed” – with the objective of ensuring that large resource construction projects are not indirectly disrupted through coordinated “go-slows” on the supply of materials to those projects.

Re-establishment of the ABC Commissioner

The Bill seeks to re-establish the role of the ABC Commissioner (cl 29), whose functions will include (cl 16):

- monitoring and promoting appropriate standards of conduct by building industry participants;
- investigating suspected contraventions, by building industry participants, of the Act, designated building laws⁵ or the Building Code (defined in cl 5); and
- providing assistance and advice to building industry participants regarding their rights and obligations under the Act, designated building laws and the construction industry code.

Inspectors can enter premises if they reasonably believe a breach of building laws has occurred or is occurring or is likely to occur, or where there are documents relevant to compliance on the premises (cl 72(1)(a),(b)).

Issuing a Building Code

Under the Bill, the minister may issue a Building Code (cl 34), a code of practice that certain persons (such as constitutional corporations and the Commonwealth) must comply with in respect of building work.

Power of the ABC Commissioner to obtain information

The ABC Commissioner may require a person to give information, produce documents or answer questions relating to an investigation of a suspected contravention of the Act or a designated building law by a building industry participant (Chapter 7).

The Bill increases the ABC Commissioner’s investigative powers by restoring the “coercive powers” formerly held by the ABC Commissioner under the BCII Act, as overseen by the Commonwealth Ombudsman. These coercive powers allow the ABC Commissioner to require people to give information and produce documents. The ABC Commissioner can serve an examination notice on a person that the Commissioner reasonably believes has information or is capable of giving evidence relevant to an investigation. Failure to comply with an examination notice is a criminal offence (cl 62). Self-incrimination privilege is not available as an excuse not to give information or produce documents; however information or documents obtained pursuant to an examination notice are not admissible in evidence against the individual in any proceedings (other than for failure to comply with an examination notice or offences under the Criminal Code relating to false or misleading information or documents or obstruction of Commonwealth officials) (cl 102).

The use of the examinations power peaked in 2008. The ABC Commissioner issued 142 notices requiring people to attend and answer questions. It may be anticipated that the number of examinations under a re-established ABC Commissioner will increase to approach previous levels.⁶

Prohibition of unlawful industrial action and unlawful picketing

Unlawful industrial action (cl 46) (including work bans, employees failing to attend work, employers locking out employees) and, for the first time in federal legislation, unlawful “picketing” (cl 47) relating to building work are prohibited by the Bill, and any affected person can seek an injunction (including an interim injunction) to restrain this behaviour. The provisions are drafted broadly and appear to be a response to a number of recent instances of disruptive picketing by construction industry unions, such as the CFMEU

blockade of Grocon’s Myer Emporium Project,⁷ discussed below. A new employer response to unlawful picketing is to promptly seek an interim injunction from the Federal Court – a remedy now enshrined in cl 48 of the Bill.

Industrial action is not unlawful if it is “protected industrial action” within the meaning of the FW Act (see s408) and is engaged in only by “protected persons”, being an employee organisation that is a bargaining representative for the proposed enterprise agreement, members of that organisation who are employed by the employer and will be covered by the proposed enterprise agreement, officers of the organisation acting in that capacity, and an employee-bargaining representative for the proposed enterprise agreement (s8(3)).

There are two elements to the definition of “unlawful picketing”. First, it is action that has the purpose of preventing or restricting a person from accessing or leaving a building site or an ancillary site, or would reasonably be expected to intimidate a person accessing or leaving a building site or ancillary site. Second, the action must be motivated by the purpose of either supporting or advancing claims against a building industry participant in respect of the employment of employees or the engagement of contractors by the building industry participant, or advancing industrial objectives of a building association, or is otherwise unlawful. Unlawful picketing has the additional requirement of being industrially motivated (cl 47(2)(b)), although a reverse onus applies (other than on an interim injunction application), so that alleged picketers must show that they were not motivated by industrial claims or objectives.

The previous strict requirement under s37 of the BCII Act – to show industrial action to be “industrially motivated” in order to obtain an injunction or prove a contravention – has been removed by the Bill. The requirement to prove industrial motivation narrowed the concept of unlawful industrial action in the building industry – including as applied by the Victorian Building Industry Disputes Panel (VBIDP) under the agreed dispute-resolution provision of the template CFMEU enterprise bargaining agreement – so as to require the payment of wages during periods of work stoppage in the construction industry, which would have amounted to illegal strike pay had the test under the FW Act been applicable. Industrial motivation was denied by unions in many cases, citing safety concerns. The CFMEU and the VBIDP were able to sidestep the question of whether the work stoppage was in response to a genuine imminent risk to safety (which was difficult for them to show as WorkSafe had

attended and had not identified such a risk) by concluding that there was no industrial motivation. Under the Bill, in order to obtain an injunction or penalty, and on the question of strike pay, action constituting unlawful industrial action need only be performance of work in a manner different to customary performance (cls 7, 46). These requirements no longer impose greater restrictions than those imposed by the FW Act, under which the sole question for the Fair Work Commission in making a stop order according to s418 is whether the industrial action (that is happening, threatened, impending or probable) is not protected industrial action (see ss408–416).

The penalties for unlawful industrial action and unlawful picketing under the Bill are \$34,000 (an increase under the Bill) for individuals and \$170,000 for corporate entities, including unions.

Prohibition of coercion and discrimination

Other action relating to coercion, undue pressure and discrimination is also prohibited by the Bill (Chapter 6). The provisions relating to coercion and undue pressure largely reflect the provisions that formerly applied under the BCII Act. The discrimination provision, however, has been redrafted and omits any reference to the word “discriminate”, which was the subject of discussion in several Federal Court cases under the BCII Act,⁸ culminating in the Full Court’s decision in *Australian Building and Construction Commissioner v McConnell Dowell Constructors (Aust) Pty Ltd*.⁹ The Full Court, in interpreting the meaning of “discriminate against” in the context of the BCII Act, held that in order to make out a contravention of the discrimination provision in s45, it was necessary to prove an adverse impact on the victim of the discriminatory conduct. The Bill appears to avoid such necessity in the new equivalent provision, cl 55, which simply prohibits a person from taking action against a building employer “because” of coverage or lack of coverage of the employer’s employees by a Commonwealth industrial instrument.

Importantly, the Bill includes, for the first time in building industry-specific legislation, reverse onus and multiple-reasons-for-action provisions in cls 56 and 57, in line with the provisions of the FW Act that apply in relation to general protections. The High Court’s clarification of the operation of such reverse onus provisions in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay*¹⁰ will therefore be of relevance in unlawful picketing, coercion and discrimination cases.

Orders for contraventions of civil remedy provisions and other enforcement powers

Jurisdiction is conferred on the Federal Court, Federal Circuit Court and certain state courts in matters involving alleged breaches of the civil remedy provisions of the Bill. An “authorised applicant” (who may be an ABC inspector or a person affected by a contravention of a civil remedy provision) may apply for an order relating to the contravention. A court may make an order such as imposing a pecuniary penalty on a person or granting an injunction.

GROCON

In the Grocon cases,¹¹ the Supreme Court of Victoria found the CFMEU guilty of breaching court orders which restrained it from preventing, hindering or interfering with free access to Grocon sites in 2012.

Background

In August 2012, Grocon issued proceedings in the Supreme Court of Victoria alleging that the CFMEU’s unlawful pickets at Grocon’s Myer Emporium project contravened common law industrial torts, including interference with Grocon’s contractual relations.

The Supreme Court granted injunctions. Grocon brought contempt proceedings (in which the Victorian Attorney-General joined) against the CFMEU when senior CFMEU officials failed to comply with the court orders.

The CFMEU had argued that the charges should be dismissed because it did not “blockade” the sites or prevent access through every entry point: it asserted that several entry gates were left open to site workers and there was no evidence of interference with free access.

Judgment

Cavanough J held that the CFMEU was liable for all 30 contempt charges, and five findings of criminal contempt were recorded, one for each of the days the CFMEU continued the illegal picketing, as well as two civil contempts relating to hindering the supply of goods. The CFMEU was fined \$1.25 million and ordered to pay Grocon’s costs on an indemnity basis (estimated at \$1 million).

It was found that site access was made impossible by the presence of protesters in numbers sufficient to constitute a physical barrier. Protesters used “active resistance” in response to attempts by Grocon employees to access the site. Blocking even one means of access to a site may thus amount to preventing “free access” – all the more so when the entry point obstructed is the usual entry point.

CONCLUSION

The Bill regulates unlawful industrial action, unlawful picketing and coercion and discrimination in the building and construction industry even more tightly than the BCII Act. Employers and the ABC Commissioner are likely to be able to utilise the reverse onus provisions to more easily prove contraventions by unions and other building industry participants for such unlawful conduct, and increased penalties apply.

By seeking the Bill’s passage into law, the federal government has sought a return to stronger regulation of unlawful conduct and respect for the rule of law in the construction industry. It seeks an impact on building industry participants that returns industrial action to lower levels and infrastructure productivity to higher levels.¹² ●

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- All references to sections in the body of this article refer to the Bill unless otherwise specified. The *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013* deals with consequential and transitional matters relating to the re-establishment of the ABC Commissioner and other matters set out in the Bill.
- Given opposition to particular provisions of the Bill (in particular by the Australian Labor Party and the Australian Greens), the Bill is more likely to be enacted post 1 July 2014 when the new senators take their seats.
- The Building Code for the Construction Industry took effect from 1 February 2013. The code sets out the expected standards for building contractors or building-industry participants involved in Commonwealth-funded construction projects.
- On 10 February 2014 the prime minister announced a Royal Commission into Trade Union Governance and Corruption, which commenced hearings on 9 April 2014. The royal commissioner is former High Court judge Dyson Heydon AC QC.
- Designated building laws are specified workplace-relations laws and industrial instruments under those laws: s5.
- Office of the Australian Building and Construction Commissioner, *Report on the Exercise of Compliance Powers by the ABCC for the Period 1 October 2005 to 30 September 2009*.
- Grocon & Ors v Construction, Forestry, Mining and Energy Union & Ors* (unreported, Supreme Court of Victoria, no 275, 24 May 2013); *Grocon & Ors v Construction, Forestry, Mining and Energy Union & Ors* (unreported, Supreme Court of Victoria, no 134, 31 March 2014).
- See Ryan J in *Helal v McConnell Dowell Constructors (Aust) Pty Ltd* [2010] FCA 1462 at [24]; Tracey J in *Helal v McConnell Dowell Constructors (Aust) Pty Ltd* (No 3) [2011] FCA 1344 at [59]; Gray J in *Cozadinos v Construction, Forestry, Mining and Energy Union* [2012] FCA 46.
- [2012] FCAFC 93.
- (2012) 290 ALR 647.
- Note 7 above.
- Australian Bureau of Statistics, 6321.0.55.001 – Industrial Disputes, Australia, Dec 2013; Productivity Commission 2014, *Public Infrastructure*, Draft Inquiry Report, Canberra, pp26–7.