Construction Industry Amendment (Protecting Witnesses) Bill 2015

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Law and Bills Digest Section

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House: Senate

Portfolio: Employment

Commencement: On Royal Assent.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website.
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Purpose of the Bill

Currently, the Fair Work (Building Industry) Act 2012 (the FWBI Act) provides the Director of the Fair Work Building Industry Inspectorate (FWBI) with a number of coercive investigatory powers. Those powers are subject to a sunset clause and will expire on 31 May 2015. As a result, those powers will not be available to the FWBI after 1 June 2015.

The purpose of the Construction Industry Amendment (Protecting Witnesses) Bill 2015 (the Bill) is to amend the FWBI Act to extend the period of time during which the Director of the FWBI can use its coercive investigatory powers by two years, until 1 June 2017.

Background

Through the Building and Construction Industry (Improving Productivity) Bill 2013 and Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 (the ABCC Bills), the Government has sought to re-institute a separate workplace relations framework for the building industry based largely on the Building and Construction Industry Improvement Act 2005 (BCII Act). Among other things the ABCC Bills seek to re-establish the Australian Building and Construction Commission (ABCC), along with its previous coercive investigatory powers provided by the BCII Act.¹

The BCII Act was (in effect) repealed and replaced by the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act 2012, which created the FWBI Act.² The Parliamentary Library prepared comprehensive Bills Digests on the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011 and its 2009 predecessor. Those Digests should be referenced for background to the current Bill, including commentary on the background to the inclusion of the sunset clause that the Bill proposes to extend by two years.³ However, a brief summary is provided below.

The Building and Construction Industry Improvement Act 2005

A Royal Commission into the building and construction industry, the Cole Commission, was established in 2001. On the basis of its first report, the Building Industry Task Force was established in 2002.⁴ The roles of the Task Force were to respond to the alleged threatening behaviour of unions by:

- investigating and (where necessary) taking legal action in relation to freedom of association breaches and
- investigating breaches of the Workplace Relations Act 1996 concerning Australian Workplace Agreements.⁵

The Cole Commission’s final report was delivered in 2003.⁶ It found widespread disregard of laws and courts, threatening and intimidatory conduct, and underpayment of employees’ entitlements. It catalogued a large number and variety of misbehaviours by unions. The Cole report noted that the short term interests of construction companies lead to their acceding to union demands which are not in the national economic interest. It found that:

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... quick fix solutions driven by commercial expediency supplant insistence on legal rights, adherence to ethical and legal norms and the pursuit of legal remedies.\(^7\)

The Commission recommended, among other things, separate legislation governing the building and construction industry and the creation of an independent body to enforce the legislation and otherwise to supervise the conduct of the industry. The BCII Act created such an independent body, the Australian Building and Construction Commission (ABCC), and the office of Australian Building and Construction Commissioner (ABC Commissioner). Further, the BCII Act provided the ABCC with wide-ranging coercive information gathering powers.\(^8\) The ABCC commenced operations on 1 October 2005, and continued to operate until it was replaced by the FWBI.

**Wilcox Report and Fair Work (Building Industry) Act 2012**

When the Labor Government came to power in 2007, its policy commitment was to abolish the ABCC but to maintain a separate, specialist inspectorate for the building and construction industry within the new Fair Work Australia (later the Fair Work Commission). It commissioned Murray Wilcox to report on the best way of achieving this.\(^9\)

The basis for including a sunset clause in the FWBI Act was outlined in the Wilcox Report, which reviewed the operation of the BCII Act and the broader issue of ‘the creation of the specialist division for building and construction work within Fair Work Australia’.\(^10\) The Wilcox Report observed that the ABCC had ‘made a significant contribution to improved conduct and harmony’ in the industry, but that there was more to be done and hence it was still necessary to have a specialist body focused on the industry.\(^11\)

Chapter 5 of the Wilcox Report examined the compulsory interrogation power in detail. Section 52 of the BCII Act gave the ABCC the power to compel a person to provide information, or produce documents, or attend before the ABC Commissioner and answer questions, if the Commissioner believed that the person had the required information or documents or was capable of giving evidence that was relevant to an investigation. A person was not excused from giving information on the grounds that to do would contravene another law or would incriminate the person or would be against the public interest. However, such information could not be used against the person in a later prosecution. Such powers had been given to other Commonwealth agencies such as the Australian Taxation Office, the Australian Competition and Consumer Commission, the Australian Securities and Investments Commission, and the Australian Crime Commission.\(^12\)

The Wilcox Report noted that in the context of the building and construction industry, the most frequently recurring types of contraventions of the law ‘seem to be unlawful industrial action, coercion of strike pay and breach of the freedom of association provisions’ and that in these types of cases ‘evidence about conversations may be essential; if not to establish the basic facts, in order to sheet home responsibility to particular people’.\(^13\)

The Wilcox Report noted:

As Mr Dixon SC pointed out in his Opinion, it is a characteristic of most of the types of conduct of employees, and their unions, that might fall foul of the Fair Work Bill (when it becomes law), that it will not be documented; the only way to ascertain exactly what happened in conversations and meetings will be to ask somebody who was there.

It follows from all this, 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.

\(^7\) M Wilcox QC, *Transition to Fair Work Australia for the building and construction industry: report*, March 2009, accessed 8 May 2015, p. 2 (para 1.11). See also p. 54, para 5.75: ‘I found widespread agreement, at all levels, that it is essential for there to be a strong industry watchdog; “a tough cop on the beat”, to use your phrase. “It was also generally agreed that, during recent years, there has been a significant improvement in harmony within the building and construction industry”.’ (emphasis added).

\(^8\) *Building and Construction Industry Improvement Act 2005* (repealed), accessed 5 May 2015.


\(^10\) Ibid., p. i.

\(^11\) Ibid., pp. 2.

\(^12\) Ibid., p. 39.

\(^13\) Ibid., p. 59, para [5.107].
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.14 (emphasis added)

As a result of the above, the Wilcox Report made the following recommendation:

The Director of the Building and Construction Division be invested with a power, similar to that contained in section 52 of the Building and Construction Industry Improvement Act 2005, to cause people compulsorily to attend for interrogation, but subject to the safeguards contained in Recommendation 4; and

(i) the grant of this power be reviewed after five years;

(ii) in order to ensure review, the provisions in the new legislation providing for compulsory interrogation be made subject to a five-year sunset clause.15

The Gillard Government introduced the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011 (the 2011 Bill), which was broadly consistent with the recommendations of the Wilcox Report.16 The 2011 Bill was passed with the support of most cross-bench Members and Senators in March 2012, becoming the FWBI Act. The FWBI Act created the FWBI in June 2012, and provided it with coercive powers along the lines recommended in the Wilcox Report.17 Importantly, those coercive powers are subject to a sunset clause (contained in section 46 of the FWBI Act) and thus will not be available to the FWBI after 1 June 2015.

However, relevantly to debate about the current Bill, the application of a sunset clause to the FWBI’s coercive investigatory powers was a controversial issue amongst stakeholders when proposed in relation to the 2011 Bill. For example, industry groups such as Australian Industry Group (AIG) argued in 2009 that there was no evidence that the ‘present conditions’ in the building and construction industry would not remain present in five years, and hence there was no justification for the inclusion of a provision that would automatically terminate the coercive investigatory powers of the FWBI at a set date.18 Likewise in 2009 the Australian Chamber of Commerce and Industry (ACCI) opposed applying a sunset clause to the coercive powers provided by the FWBI Act to the FWBI.19

A number of construction unions argued against providing any coercive powers to the FWBI in 2009, whilst other commentators expressed the view at the time that the imposition of a sunset clause was a ‘highly desirable’ improvement, but that ‘even with these safeguards the coercive powers provided... are not justified’.20

In addition to the inclusion of the sunset clause being a controversial and divisive issue amongst stakeholders at the time, the recommended review of the coercive investigatory powers provided by the FWBI Act to the FWBI has not yet occurred.

15. Ibid., recommendation 3, p. 60.
**Why is the Bill needed?**

The ABCC Bills, whilst having been passed by the House of Representatives, remain before the Senate. As noted by the Minister ‘the Government appreciates that the Senate requires additional time to consider the ABCC Bills.’ The ABCC Bills would, if passed, provide a permanent legal basis for the use of coercive investigatory powers by the ABCC. However, if the ABCC Bills are not passed then the sunset period on the use of coercive investigatory powers contained in the *FWBI Act* will expire. Hence those powers will no longer be available to the FWBI from 1 June 2015.

The Government argues that coercive investigatory powers are necessary to ensure the FWBI ‘is able to carry out its investigations effectively and break down the “culture of silence” and retribution’ that it argues still exists in the building and construction sector. Put simply, the Government is of the view that the ‘present conditions’ in the building and construction industry justify (at the minimum) the continuation of the availability of coercive investigatory powers for another two years or (preferably) their permanent availability.

As a result, to ensure that the coercive powers are still available to the FWBI whilst the ABCC Bills are considered, the Bill seeks to extend the *FWBI Act* sunset clause by two years.

**Committee consideration**

**Senate Selection of Bills Committee**

The Senate Selection of Bills Committee referred the Bill for inquiry and report (see below) to ensure a ‘thorough and complete assessment on the potential impact on workers’ rights’.

**Senate Education and Employment Legislation Committee**

The Bill was referred to the Senate Education and Employment Legislation Committee for inquiry and report.

The Government Senators’ Report recommended that the Bill be passed on the basis 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 Labor Senators’ dissenting Report recommended that the Bill not be passed until ‘the Government conducts an independent review into the extension of the sunset clause.’ The Greens’ dissenting Report recommended that the Bill not be passed on the basis that ‘there should be no separate agency and no separate powers in the form outlined in this legislation.’

**Senate Standing Committee for the Scrutiny of Bills**

At the time of writing the Senate Standing Committee for the Scrutiny of Bills had not yet considered the Bill.

**Parliamentary Joint Committee on Human Rights**

At the time of writing the Parliamentary Joint Committee on Human Rights had not yet considered the Bill.

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Policy position of non-government parties/independents

**Labor**

Previously (in 2007) the ALP had opposed the need for a building and construction industry-specific regulator. It would appear that currently the ALP does not support the proposition advanced by the Government that as the building and construction industry is ‘plagued by lawlessness, intimidation and thuggery’, an industry-specific regulator with coercive powers is required, with Senator Urquhart stating (in relation to the ABCC Bills) that the Government:

... has failed to mount a reasonable *case about why the building and construction industry is so unique that it needs a special body with these draconian powers and penalties.*

Whilst the ALP (when in Government) provided the FWBI with its current coercive powers, it also introduced the various safeguard mechanisms on their use and foreshadowed that ‘their use and ongoing need’ would be subject to a review, which would then form the basis of any decision on ‘whether the coercive powers will be extended’ after the expiry of the sunset clause, clearly foreshadowing the view that they were not intended to be a permanent feature of the FWBI’s powers as a regulator and would only be provided as long as they were needed to change the culture of the sector.

In their Dissenting Report on the Senate Education and Employment Legislation Committee Inquiry into the Bill, the ALP Senators stated that:

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.

**Greens**

In 2010, Senator Siewert introduced the Building and Construction Industry (Restoring Workplace Rights) Bill 2010 into the Senate. The Bill (as with its 2008 predecessor Bill) sought to repeal the BCII Act and the Building and Construction Industry Improvement (Consequential and Transitional) Act 2005, which would have had the effect of returning building industry supervision to the Fair Work Ombudsman. Senator Siewert stated in her introduction to the Bill:

These laws [the BCII Act and the Building and Construction Industry Improvement (Consequential and Transitional) Act 2005] are some of the most pernicious ever to have passed through this place. They strip away internationally recognised rights of workers in the building and construction industries. This Bill is intended to ensure such laws no longer exist in Australia. A consequence of the repeal of the BCII Act is the abolition of the Australian Building and Construction Commissioner (the ABCC). The ABCC has sweeping powers that have no place in the regulation of workplaces.

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29. K Rudd and J Gillard, *Forward with fairness: Labor’s plan for fairer and more productive Australian workplaces*, Australian Labor Party policy document, April 2007, p. 17, accessed 2 April 2015: ‘Labor does not believe in separate industrial rules and regulations for different industries. Under Labor all employers, employees and unions across all industries will be required to comply with the rules and will face penalties if they do not do so. Fair Work Australia’s inspectorate will have specialist divisions that can focus on persistent or pervasive unlawful behaviour in particular industries or sectors. The first divisions established will be for the building industry and hospitality industry.’ (emphasis added).


It is an affront to democracy to have workplace relations laws that take away the right to silence, deny people their choice of lawyer, provide powers to compel evidence with the possibility of gaol for non-compliance, and impose severe restrictions on the rights of workers to organise and bargain collectively.  

In relation to the 2011 Bill (which became the FWBI Act), the Greens unsuccessfully moved a number of amendments which would have, amongst other things, removed the coercive powers provided to the FWBI altogether. Adam Bandt (Greens Member for Melbourne) stated:

There is a basic principle that should continue to apply: there should be one set of laws in this country that apply uniformly to all citizens. You should not have fewer rights in this country just because you turn up to work in a hard hat and boots than if you turn up in a suit and tie... If these coercive powers and this legislation remain and if we continue with two tiers of industrial regulation in this country, where you may have fewer rights because you work in the building industry, it will be purely and simply because Labor wants it to remain that way. I commend the amendments to the House.

Those amendments were only supported by Bob Katter and Andrew Wilkie (the Member for Denison) and thus were unsuccessful. Bob Katter (the Katter's Australian Party Member for Kennedy) also moved a number of amendments, noting ‘what we are proposing here is the removal of those coercive powers now instead of... in three years’ time’. Those amendments were also only supported by the Greens and Andrew Wilkie, and thus were also unsuccessful.

In their Dissent Report on the Senate Education and Employment Legislation Committee Inquiry into the Bill, the Australian Greens reiterated their previous opposition to the provision of coercive powers aimed specifically at the building and construction industry, and indicated they will oppose the Bill.

Other Senators

The formal position of cross-bench Senators (other than those discussed below) in regards to the Bill is not clear.

Senator John Madigan

Senator Madigan opposed the ABCC Bills, stating that:

This Bill would treat one group of workers and a union involved in the construction industry more harshly than their peers in other industries. This is an affront to the idea that all individuals should be treated equally before the law. It is absurd that two individuals should face different sanctions for committing the same infringement just because one works in the construction industry and one does not.

However, Senator Madigan has not released a formal position on the Bill itself.

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Senator Jacquie Lambie
Independent Senator Jacquie Lambie opposed the ABCC Bills, largely on the basis that the proposed coercive powers risk ‘damaging fundamental human and civil rights’. However, Senator Lambie has not released a formal position on the Bill itself.

Position of major interest groups
The major interest groups that made submission to the Senate Education and Employment Legislation Committee Inquiry into the Bill, have not changed their positions on the appropriateness of coercive powers generally in the intervening years since the introduction of the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009 (2009 Bill) and the 2011 Bill.

Australian Industry Group
The Australian Industry Group has indicated its support for the Bill, stating that the compulsory examination powers of the Regulator are ‘fair, reasonable and necessary’. The AIG states that the powers:

- Have been in place since June 2005 and have operated fairly and appropriately throughout this whole period
- Are similar to those possessed by ASIC, the ACCC and the ATO
- Were a key recommendation of the Cole Royal Commission into the Building and Construction Industry
- Are subject to oversight by the Commonwealth Ombudsman who must monitor and review the exercise of the examination powers, including receiving a copy of all examination notices, and receiving a report, video recording and transcript of every examination. The Ombudsman is required to report to Parliament annually on the use of the examination powers and, in each annual report, the Ombudsman has concluded that all examinations have been conducted in accordance with legislative requirements and best practice principles.

In its submission to the Senate Education and Employment Legislation Committee Inquiry into the Bill, it noted that it supported the Bill for a number of reasons, including that in its view:

There is simply no valid case for the abolition of the examination powers when the CFMEU and other construction unions continue to break the law on a very regular basis.

Combined Construction Unions
The Construction, Forestry, Energy and Mining Union (CFMEU) opposed the introduction of both the ABCC and its replacement (the FWBI), as well as providing them with coercive investigatory powers, on the grounds that, in its view:

- the construction industry should be regulated by the same general laws applying to everyone else in the federal system and
- coercive powers have no place in the industrial laws of a democracy.

In their combined submission to the Senate Education and Employment Legislation Committee Inquiry into the Bill, the Combined Construction Unions (CFMEU; Automotive, Food, Metals, Engineering, Printing and Kindred

45. Ibid.
Industries Union (AMWU); Australian Workers Union (AWU); and Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU)) noted their opposition to the Bill for a number of reasons, including that:

The Combined Construction Unions have consistently opposed the introduction and use of these powers in industrial matters since their inception. 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.  

**Australian Mines and Metals Association**  

In contrast, in relation to the ABCC Bills, the Australian Mines and Metals Association (AMMA) noted that:

The current legislation’s proposed automatic repeal of the compulsory information gathering powers in 2015 without any requirement that the necessary cultural change be achieved would also have been a disastrous move and **AMMA welcomes the removal of that sunset provision from the current bill.**  

In relation to the current Bill, the AMMA noted its support for passage of the current Bill, but also noted that it ‘continues to strongly support the passage’ of the ABCC Bills.  

**Other interest groups**  

Other major employer groups including the Master Builders Association (MBA), the Housing Industry Association (HIA), the Australian Chamber of Commerce and Industry (ACCI), and the AIG have also (previously) generally welcomed the availability of coercive powers, stating their use will help restore the rule of law in the building and construction industry.  

In relation to the Bill, the ACCI noted it supported the Bill as ‘an interim measure’ pending passage of the ABCC Bills. Likewise the MBA supported the Bill on the basis that it ‘is essential so that the FWBC, albeit with less than optimal powers, may continue its work.’  

**Financial implications**  

The Bill’s Explanatory Memorandum Financial Impact Statement indicates it will have ‘nil’ financial impact. However, the Government had previously indicated that it had committed an additional $35 million over four years to the re-established ABCC.  

It is not clear if passage of the Bill would result in that funding commitment being delayed until the possible re-establishment of the ABCC, or whether that funding commitment, or part of it, would be re-directed to the FWBI.  

**Statement of Compatibility with Human Rights**  

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. Noting that the Bill engages the right to a fair trial and the right to

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privacy and reputation, the Government considers that the Bill is compatible, because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.\(^{55}\)

However, given that the Bill proposes to extend the period of time during which the FWBI can use the coercive investigatory powers provided by the *FWBI Act*, which in turn are very similar to those provided by the *BCII Act*, it would appear that the Bill raises a number of human rights issues which are examined below under the heading ‘**Key issues and provisions**’.

**Key issues and provisions**

**Human rights issues raised by the coercive powers**

As noted in a previous Bills Digest, the FWBI retained the coercive investigatory powers originally provided by the *BCII Act* to the ABCC to require a person to:

- give information
- produce documents and
- attend an interview to answer questions.\(^{56}\)

However, the *FWBI Act* introduced a number of safeguards on the use of the coercive powers (discussed below). As a result of the similarity of the powers provided to the FWBI and the ABCC, they raise similar human rights issues and hence any discussions around the human rights issues raised by ABCC Bills are pertinent to the consideration of the Bill.

**Safeguards on the use of coercive investigatory powers contained in the FWBI Act**

The *FWBI Act* introduced a number of safeguards on the use of the coercive investigatory powers originally provided to the ABCC. Importantly these include that:

- the FWBI must apply for an examination notice to a Presidential Member of the Administrative Appeals Tribunal (AAT)\(^{57}\) who
- must be satisfied that a case has been made out for its use.\(^{58}\)

The *FWBI Act* also provides that the Commonwealth Ombudsman must be notified whenever an examination notice is issued.\(^{59}\) Further, the FWBI must provide a report on, and video recording and transcript of, the examination to the Commonwealth Ombudsman, who must then review the examination and provide annual reports to Parliament.\(^{60}\)

If the Bill is passed, those safeguards will remain in place. However, the coercive investigatory powers themselves have previously been identified by a number of Parliamentary Committees as still raising a number of human rights issues, as briefly summarised below.

**The right to equality and non-discrimination**

In relation to the ABCC Bills, the Parliamentary Joint Committee on Human Rights (PJCHR) provided a detailed discussion and analysis of the compatibility of the coercive powers with the right to equality and non-discrimination, which can be found on pages six to 12 of the PJCHR’s *Second Report of the 44th Parliament*\(^{61}\) and on pages 43 to 49 of its *Tenth Report of the 44th Parliament*.\(^{62}\)

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58. Ibid., section 47.

59. Ibid., section 49.

60. Ibid., section 54A.


In brief, it noted that whilst it is permissible to enact legislation relating to particular forms of economic or social activity, singling out a particular group of workers in a specific sector of the economy and subjecting them to a different range of prohibitions and an accompanying investigative and enforcement regime ‘may give rise to human rights concerns’.\(^63\) Further, whilst initially expressing the view that ‘it is not clear that an objective basis for the differential treatment has been clearly demonstrated’ and that it had ‘concerns about whether the proposed legislative scheme is consistent with the right to equality and non-discrimination’, after reviewing the Minister’s response to its concerns, the PJCHR concluded its consideration of the issue.\(^64\)

**The right to privacy**

In relation to the ABCC Bills, the PJCHR provided a detailed discussion and analysis of the compatibility of the coercive powers with the right to privacy, which can be found on pages 17 to 27 of the PJCHR’s *Second Report of the 44th Parliament*,\(^65\) pages 60 to 71 of its *Tenth Report of the 44th Parliament*,\(^66\) and pages 111 to 113 of its *Fourteenth Report of the 44th Parliament*.\(^67\)

In brief, it noted that the coercive investigatory powers give rise to significant human rights concerns because of their breadth and availability in relation to civil wrongdoing rather than serious criminal offences and application only to one part of the workforce.\(^68\)

The PJCHR stated that the goal of seeking to ensure that participants in an industry (in this case, the building and construction industry) observe the workplace relations laws that apply to that industry is a legitimate objective within the meaning of relevant international human rights agreements to which Australia is a signatory.\(^69\) However, it also initially concluded that on the basis of the material provided in the explanatory memorandum and statement of compatibility that a rational connection between the conferral of coercive information-gathering powers on the ABCC and the achievement of the stated goals had not been clearly demonstrated. It therefore concluded that the limitations on the right to privacy had not been demonstrated to be a proportionate measure.\(^70\)

After reviewing the Minister’s response to its concerns, the PJCHR concluded certain measures contained in the ABCC (especially in the absence of additional safeguards similar to those provided by the FWBI Act) remained incompatible with the right to privacy.\(^71\) However, the concerns outlined above were partly due to the ABCC Bills’ ‘limited procedural safeguards restricting and monitoring their use’.\(^72\) As the current Bill would not impact on the safeguards contained in the FWBI Act, it would appear less likely to raise significant issues related to a disproportionate impact on the right to privacy.

**The prohibition against self-incrimination**

In relation to the ABCC Bills, the PJCHR provided a detailed discussion and analysis of the compatibility of the coercive powers with the prohibition against self-incrimination, which can be found on pages 27 to 29 of the PJCHR’s *Second Report of the 44th Parliament* and pages 73 to 75 of its *Tenth Report of the 44th Parliament*.

In brief, it expressed concern about the use of coercive investigatory powers in conjunction with the abrogation of the privilege against self-incrimination.\(^73\) After considering the Minister’s response, which included significant amounts of statistical information related to rates of industrial disputation and the number of examinations (conducted by the ABCC and FWBI), the PJCHR concluded that ‘the proposed measures are likely to be incompatible with the right against self-incrimination’.\(^74\)

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64. Ibid., p. 11; PJCHR, *Tenth report of the 44th Parliament*, op. cit., p. 49.
69. Ibid., p. 19.
70. Ibid., pp. 20–24.
73. Ibid., p. 28.
In addition, the Senate Scrutiny of Bills Committee (Scrutiny Committee) also expressed concerns about the use of coercive powers and the abrogation of the privilege against self-incrimination.

In relation to the abrogation of the privilege against self-incrimination, the Scrutiny Committee discussed its concerns on pages 16 to 17 of its Alert Digest No. 9 of 2013 and pages 122 to 125 of its Fourth Report of 2014. It requested that ‘key information’ provided by the Minister in his response to the Committee ‘be included in the explanatory memorandum’ and concluded that ‘the question of whether the proposed approach is appropriate’ be left to ‘the consideration of the Senate as a whole’.

Is the building and construction sector affected by ‘unlawful conduct, thuggery and intimidation’?

As noted earlier, the Government argues that the availability of coercive investigatory powers to the FWBI remains necessary to ensure it ‘is able to carry out its investigations effectively and break down the ‘culture of silence’ and retribution that exists in the sector’. In other words, the Government is of the view that the ‘present conditions’ in the building and construction industry are similar to those examined by the Cole Report in 2003 and the Wilcox Report in 2009, and hence justify the continued availability of coercive investigatory powers for another two years (at least).

One of the key issues raised by the Bill is therefore whether the building and construction sector is characterised by ‘unlawful conduct, thuggery and intimidation’ as argued by the Government.

This issue was explored in detail in previous Bills Digests. In summary, both evidence surrounding this issue and the findings of two major reports have been interpreted in diametrically opposed ways by the Government and the Opposition, as detailed in the table below.

Table 1: Differing views on findings of key reports

<table>
<thead>
<tr>
<th>Report</th>
<th>Government’s view</th>
<th>Opposition’s view</th>
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<td>Cole Royal Commission</td>
<td>Coercive investigatory powers are needed to ‘penetrate the veil of silence behind which many decisions to take unlawful industrial action are hidden’. Further, without them the regulator would not be able to adequately perform its functions due to the closed culture of the industry.</td>
<td>The case for coercive investigatory powers on the basis of ‘supposed criminality, fraud and corruption within the building and construction industry’ is overstated as evidenced by the subsequent failure to ‘produce one single criminal conviction’.</td>
</tr>
<tr>
<td>Wilcox Report</td>
<td>Coercive investigatory powers are required in light of the ongoing significant degree of contravention of the relevant industrial laws in the building and construction industry.</td>
<td>At the time of introduction of the 2011 Bill, coercive investigatory powers were required to be retained ‘for the time being’. However, there is evidence of continuing ‘improvements in behaviour in the industry’ and hence once the desired cultural change occurs, coercive investigatory</td>
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78. Ibid., p. 2375.
**Report** | **Government’s view** | **Opposition’s view**
---|---|---
| | | powers will be unnecessary and should cease to be available.83

Sources: as per footnotes in table above.

In addition to the two major reports noted above, the Government also argues that the interim report of the Heydon Royal Commission84 also supports the necessity for retaining coercive investigatory because:

- there is a ‘culture of wilful defiance of the law which appears to lie at the core of the CFMEU’85 and
- information obtained through examination notices allows the regulator to determine whether breaches of the law have occurred and to make an informed judgment about whether to commence proceedings or take other steps to ensure compliance with the law.86

The Opposition has not formally commented on the interim report of the Heydon Royal Commission, but has argued that ‘it has clearly been a platform for people to settle scores’.87

**Are the coercive investigatory powers necessary?**

As noted earlier in this Digest, it is argued that the provision of coercive investigatory powers to the FWBI is necessary because of wide-spread unlawful conduct within the building and construction industry.

It flows from this that determining whether that is the case will therefore likely determine whether or not the provisions of industry-specific coercive investigatory powers to the FWBI are justified. In turn, that may also influence whether cross-bench Senators are likely to support the Bill.

**Concluding comments**

As noted earlier, the Government and Opposition, often referring to the same statistics, reports and cases, hold opposing views as to the current conditions and culture within the building and construction sector. The Government’s view is that the building and construction sector is still characterised by wide-spread unlawful conduct similar to that identified by the Cole and Wilcox Reports. In turn, the Opposition is of the view that there is evidence that the culture of the building and construction sector has changed.

Given the centrality of that argument for both the FWBI’s existence and providing it with coercive investigatory powers, it would appear likely that the Bill will generate a lot of debate around the current conditions within the building and construction sector, and whether they reflect a change to the types of conditions that were used to justify the creation of the ABCC and, in turn, the FWBI, as well as providing them with coercive investigatory powers.

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86. Ibid., p. vi.
Construction Industry Amendment (Protecting Witnesses) Bill 2015

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