

Employment Alert

# New watchdog, old tricks? The re-instatement of the Australian Building and Construction Commission

*Building and Construction Industry (Improving Productivity) Bill 2013 (Cth)*

## WHAT YOU NEED TO KNOW

- Today, the Federal Government introduced the *Building and Construction Industry (Improving Productivity) Bill 2013* into the House of Representatives.
- The Bill, if passed, will replace the *Fair Work (Building Industry) Act 2012*.
- The Bill contains some important measures regulating conduct in the building and construction industry.
- Significantly, a new Australian Building and Construction Commissioner will be established under the Bill, and the Office of the Fair Work Building Industry Inspectorate (FWBII) will be renamed as the Australian Building and Construction Commission.
- The ABC Commissioner will have increased powers (including coercive powers) to investigate and enforce breaches of the legislation, including in relation to offshore building and construction projects.
- The Bill establishes a broader base of legislative provisions that will enable employers and the ABC Commissioner to seek injunctive relief, significantly increased penalties and other remedies in relation to unlawful industrial action and "unlawful picketing".
- The ABC Commissioner will also be vested with responsibility for administering a potential new Building Code, which the Minister may issue under the Bill.
- This Alert summarises the key proposed changes to the existing laws.

The Coalition Government has sought to fulfil its 2013 election commitment to re-establish the ABCC by tabling the *Building and Construction Industry (Improving Productivity) Bill 2013* in the House of Representatives today. Under the Bill, the ABCC, which operated from 2005, will replace the FWBII. The FWBII supplanted the ABCC in mid-2012. This follows the Federal Government's announcement on 17 October 2013 of the appointment of two former heads of the ABCC, Nigel Hadgkiss (as Director of the FWBII) and the Honourable John Lloyd PSM (as Chair of the FWBII's advisory board), to steer the FWBII during the transition.

The Bill reinstates various measures that were initially legislated in the *Building and Construction Industry Improvement Act 2005* (BCII Act) in response to the Cole Royal Commission, but which were largely abolished by the FWBI Act in 2012. The framework and structure of the new Bill largely mirrors the BCII Act and proposes to apply to "building work" and "building industry participants" which includes contractors, employees and unions.

This Alert considers the main features of the Bill. The implications for employers largely stem from the ABC Commissioner's enhanced power to deal with various industrial issues in the building and construction industry, including unlawful industrial action and the newly created statutory unlawful picketing contravention.

The Coalition does not command a majority in the current Senate. It is unclear whether the Bill will be passed in the Senate, at least until 1 July 2014, when the new Senate sits.

## Unlawful industrial action

Under the Bill, a person can apply for an injunction (including an interim injunction) to restrain a person from organising or engaging in unlawful industrial action that relates to building work.

The definition of industrial action is similar to that in the Fair Work Act and previous iterations of federal industrial legislation. Industrial action includes bans on working, employees failing to attend work and employer lockouts. However, the Bill does not reinstate the concept under the BCII Act of industrial action needing to be "industrially motivated".

A feature re-introduced under the Bill is that industrial action covered under the Bill will not be protected under the Fair Work Act where the industrial action is supported by persons other than those directly involved in the relevant bargaining.

The Bill extends the strike pay provisions in the Fair Work Act to also apply in relation to unlawful industrial action under the Bill (including with the significantly increased penalties).

## Unlawful picketing

In what is likely to be a hotly debated issue, the Bill creates a new statutory unlawful picket civil contravention. Under the Bill, an unlawful picket is defined to include action that:

- directly prevents or restricts a person accessing or leaving a building site or an ancillary site (or has that purpose); or
- would reasonably be expected to intimidate a person accessing or leaving a building site or an ancillary site (ie an objective test).

Pickets will not be unlawful under the Bill unless industrially motivated or otherwise unlawful.

A reverse onus applies in relation to the new picketing provisions, and also for other civil penalty provisions largely reinstated from the BCII Act. The effect of the reverse onus is that it is assumed under the Bill that a person has taken action for the alleged unlawful reason or intent, unless the person proves otherwise.

These amendments are squarely aimed at restraining and dispersing large-scale and targeted pickets such as those the subject of evidence in *Grocon & Ors v Construction, Forestry, Mining and Energy Union & Ors* [2013] VSC 275. The Grocon dispute involved a

16 day union blockade at various places in contempt of court orders. The blockade resulted in losses to Grocon estimated at about \$10 million. The Explanatory Memorandum to the Bill expressly refers to the circumstances of the *Grocon* case.

Injunctive relief under the Bill provides employers with an alternative to bringing factually and legally complex proceedings under various common law torts.

## Significant coercive powers

The Bill will provide the ABC Commissioner with enhanced coercive powers to require people to give information, produce documents or attend interviews to give evidence. Significant personal penalties can apply for a failure to comply.

This reinstates the former ABCC's more unrestricted coercive powers compared to the FWBII's powers, which were subject to numerous safeguards and were to have been phased out by 2015.

The FWBII did not conduct any compulsory examinations in its first year of operation, and conducted two compulsory examinations (in the same investigation) during its second year of operation.

## Industry specific penalties

The Bill seeks to reinstate industry specific penalties for unlawful industrial action and unlawful picketing. The penalties are significantly higher than those under the FWBI Act, which are currently in line with those under the Fair Work Act.

The existing maximum penalties under the FWBI Act are \$10,200 for individuals and \$51,000 for corporations. Under the Bill, the proposed maximum penalties will be \$34,000 for individuals and \$170,000 for corporations.

The Bill also reinstates the ABC Commissioner's ability to commence litigation for industrial contraventions even after industrial parties may have reached a settlement. This reverses the highly criticised limitation in the FWBI Act. Under the Bill, the ABCC may also seek damages.

## Application to offshore construction

The Bill's application extends to building work carried out in Australia's exclusive economic zone and waters above the continental shelf. This means that the ABCC will have new powers to regulate offshore building and construction projects including, significantly, the supply of those projects by vessels operating from Australian ports.

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