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27 September 2016

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Committee Secretary
Senate Education and Employment Committees
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By email: eec.sen@aph.gov.au

Dear Secretary,

Re: *Building and Construction (Improving Productivity) Bill* 2013 and a Related Bill

We refer to the inquiry being undertaken by the Committee into the above Bills and enclose for the Committee's consideration the following documents:

1. Joint Submission by the CFMEU and other unions in relation to the *Building and Construction (Improving Productivity) Bill* 2013 and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013* dated 19 February 2016.

2. Further Submission by the CFMEU (September 2016).

The CFMEU strenuously opposes these Bills and relies on these and other comprehensive submissions made to this Committee in support of our position.

This is deeply flawed legislation which serves neither the needs of the construction industry nor the national interest. It is the product of the deep-seated class warfare mentality of a Coalition Government which lacks the imagination or capacity to devise a positive reform agenda for the industry but chooses instead to continue to attack fundamental rights of organised labour.

The ABCC represents the absolute low-water mark for the politicisation of any public agency. Its track record shows it pays no heed to conventional notions of public sector neutrality. It ignores the current directive of the legislature to act in the interests of all building industry participants choosing instead to cast itself as 'watchdog' over workers and unions.

We urge the Committee to recommend that the Bills be rejected.

We would welcome an opportunity to address the Committee on these Bills.

Yoursfaithfully,

Dave Noonan
Secretary
CFMEU
Construction and General Division

CFMEU SUBMISSION TO THE SENATE EDUCATION AND EMPLOYMENT LEGISLATION COMMITTEE BUILDING AND CONSTRUCTION INDUSTRY (IMPROVING PRODUCTIVITY) BILL 2013 AND RELATED BILL

CFMEU

1. THE REPEAT OH&S OFFENDER AND THE PENALTIES THEY PAY FOR WORKPLACE FATALITIES

The John Holland Group of companies (JHG)[1] is an important player in the Australian construction industry. Major construction contracts worth hundreds of millions of dollars have been awarded to the JHG by the Commonwealth Government over the last ten years.

JHG also holds a privileged position in relation to its workers' compensation arrangements.

Since 2007, it has held a self-insurance licence under the Comcare scheme. This allows it to manage all its own workers' compensation claims and accept the liability to make compensation payments in cases of work-related injury or death. The licence is granted by a Commonwealth agency called the Safety Rehabilitation and Compensation Commission.

JHG is one of only a very few private sector businesses who have been granted Comcare licences and is able to self-insure under this system.

But what does the JHG record of compliance with workplace laws, particularly occupational health and safety laws, look like?

And should it continue to enjoy it privileged status as a Commonwealth self-insurance licence holder and recipient of lucrative federal government contracts?

The answer is simple - JHG safety record is appalling: **four horrific fatalities in less than four years.**

Serious health and safety breaches by JHG have resulted in fatalities and fines in the order of $170,000 to $180,000 for each fatality.

Now the Turnbull Government wants to **increase penalties for construction workers** and their unions for taking industrial action.

They want to lift these penalties to **$180,000 for unions and $36,000 for individual workers**, even for some stoppages relating to OH&S issues.

How can this be justified when you look at the penalties paid by construction companies responsible for workplace deaths?

Here is the shocking story of the John Holland safety record …. and the price they have paid for their involvement in the loss of human life.

CASE 1

Comcare v John Holland Pty Ltd (No 2) [2009] FCA 1515 - Fatality

Mark McCallum was working at the Dalrymple Bay Coal Terminal in Queensland on 6 March 2008.

The work involved the transportation of precast concrete decks by a platform supported by two jinkers propelled by a front end loader. Mr McCallum's leg became caught amongst wooden scaffolding planks as the wheels of the front jinker began to press down and run over the planks. Another employee working alongside him believed that he could not safely assist Mr McCallum to free himself so he ran to the right side of the jetty so that he could see a third employee to signal for the transportation unit to stop. The unit stopped a few seconds later but by this time the front wheels of the front jinker had passed over Mr McCallum's trapped body. Emergency assistance was requested and a paramedic arrived at the scene, but nothing could be done to assist Mr McCallum who had suffered fatal injuries.

The company admitted that its conduct had caused Mark McCallum's tragic death.[2]

It did not carry out a plant hazard assessment for a piece of plant that killed Mr McCallum. An assessment would likely have identified a need for a remote braking system and radio protocol that would have prevented this tragedy.

The Court said:

> *The dangers were obvious from the start, relatively simple to avoid, but unrecognised and unaddressed in a manner which raises the objective gravity of the offence …towards the higher end of the scale.*

1. John Holland Group Pty Ltd, John Holland Pty Ltd and John Holland Rail Pty Ltd

2. Judgment at [48].

And:

> *The size of the plant involved, the vulnerability of workers in front of it, and the very real risk of serious injury or death in the absence of a fail-safe means of immediate emergency communication does* ***suggest a systemic failure by the respondent rather than "a risk to which an employee was exposed because of a combination of inadvertence on the part of an employee and a momentary lapse of supervision" as contended by the respondent.***

John Holland was fined **$180,000.00.**

CASE 2:

Comcare v John Holland Pty Ltd [2012]
FCA 449 - Fatality

The incident that caused Wayne Moore's death occurred on 19 March 2009 at the Mount Whaleback mine in WA. Unsecured grid mesh Mr Moore was standing on and which had not been secured in accordance with Australian standards when it was laid, gave way, causing him to fall 10 metres and sustain fatal injuries.[3]

Two previous incidents involving grid mesh falling to the ground, labelled by the Court as 'near misses', had occurred just days before. Significantly, John Holland Pty Ltd had failed to report these incidents (which its management had actual notice of) to the SRCC.[4] No action was taken after these earlier incidents to rectify a serious occupational health and safety issue.[5]

The Court said there were measures open to John Holland Pty Ltd that were reasonably practicable and would have prevented Mr Moore's tragic death. Specifically, it found that there were no adequate reporting procedures in place in regards to the incidents.[6]

The Court was minded to impose the maximum penalty of **$242,000** available under the Act.

The incident was the result not of inadvertence by an employee, but a fundamental systematic failure by John Holland Pty Ltd.

The Court lamented that the maximum penalty imposed was insignificant compared with the loss of human life and that large corporations like John Holland Pty Ltd might be expected by the community to pay substantially more than the prescribed maximum penalty in the circumstances.[7]

John Holland gave an undertaking to ensure that they would *"use their best endeavours to observe and implement industry best practice in relation to work health and safety"*.

CASE 3

Comcare v John Holland Pty Ltd [2014]
FCA 1191 - Fatality

On 30 December 2011 Anthony Phelan was working on sinking of the railway tracks to and from Perth Central railway station. He was operating a high pressure water and air mist hose cleaning debris from the rail tracks. He was wearing earplugs.

At the same time, about 160 metres further up the rail tracks was a hi-rail vehicle. The hi-rail vehicle was located on a decline. During the off-tracking process, the hi-rail vehicle lost its braking capability. It started descending the decline gathering momentum as it went. The employee operating the vehicle lost control of it. He sounded the vehicle's warning horn. Mr Phelan was directly in the path of the runaway vehicle. There were warning shouts from other workers. Mr Phelan apparently did not hear the warning horn or shouts because of the earplugs he was wearing and the noise from the hose he was using. The hi-rail vehicle struck him and he was fatally injured.

The accident that killed Anthony Phelan was determined by the Court to have been foreseeable.[8]

The Court said neither JHG company had taken steps identified by both of them to be necessary to discharge their obligations in relation to their employee's safety.

This was made worse by the fact that the companies had been sent a safety notice by the

3. Id at [26].
4. Id at [12].
5. Id at [44].
6. Ibid.
7. Id at [42].
8. Judgment at [80].

Office of Rail Safety Western Australia following a similar incident involving a runaway vehicle *before* the death of Mr Phelan and had *failed to take remedial action.* That notice advised the companies of the need to restrain vehicles to prevent the potential for 'runaway'.[9]

The Court noted that the death of Mr Phelan was the third fatal accident in 5 years that had occurred at sites JH Pty Ltd controlled.[10] It concluded:

> *The need to remind the [companies] of the importance of constant vigilance in relation to workplace safety, is particularly important because [they]* ***operate in an industry which on a daily basis requires their employees to carry out inherently dangerous activities or to operate, and work in the vicinity of, vehicles which have the propensity to put their lives at risk.*** *Constant vigilance was not present in the circumstances of this tragic case. The result was that a man lost his life… [emphasis added]*

The two JHG companies were fined **$180,000** each.

CASE 4:

Comcare v John Holland Pty Ltd [2016]
FCA 501 - Fatality

On 29 September 2011, Sam Beveridge, a 40 year old diesel fitter employed by John Holland Pty Ltd on the Brisbane Airport Link project died after being struck by a falling beam whilst performing work on the formwork that was used to pour suspended concrete slabs which formed the roof of the tunnel.

Mr. Beveridge suffered severe crush injuries to his head, neck and chest. He died in hospital two days later.

John Holland admitted it failed to provide Mr Beveridge with training on risk or control measures for the work, or a safe system of work for the cutting of the formwork.

"In this case there was a clear failure to take all reasonably practicable steps to ensure this work was carried out safely," the CEO of Comcare said after the decision.

"Detailed risk assessments are fundamental requirements in identifying hazards and ensuring the health and safety of workers, and that did not happen here."

The company was fined **$170,000.**

Other Cases

CASE 5:

Comcare v John Holland Pty Ltd [2009]
FCA 771 – Serious Injury

This case concerned a contravention at a worksite at Koolyanobbing railway siding in Western Australia, where the repair of rail tracks was being undertaken in November 2007.

Welding activities were being undertaken, at the company's behest and direction, unsafely, near a fuel source. A fire broke out and an employee suffered second degree burns to 20% of his body.[11]

The Court said that the company's conduct was objectively serious and that the consequences could have been far more serious but for immediate action taken by another employee.[12]

It found that the injured employee had never seen the company's documentary procedures relating to refuelling in proximity to a heat source.[13]

A fine of **$124,960** was imposed.[14]

CASE 6:

Comcare v John Holland Pty Ltd [2015]
FCA 388 – Serious Injury

John Holland Pty Ltd failed to take all reasonably practicable steps to protect the health and safety of its employees in relation to an incident that occurred on 1 December 2011 on the Airport Link Tunnel project in Brisbane.

The incident involved a metal bridge being dislodged and falling to the ground, striking an employee of John Holland in the head. The employee, Alexander Hogg, suffered serious

9. Id at [52].
10. Id at [94].
11. Judgment at [59].
12. Id at [171] and [188].
13. Id at [161].
14. Id at [188].

lacerations and other injuries.[15] Other employees were also exposed to risk or injury from the dislodgement of the metal bridge.[16]

The Court found that the company had:

- failed to conduct a formal risk assessment;
- failed to provide the work crew with any information or training;
- failed to take steps reasonably practicably open to it which would have enabled maintenance of a safe working environment;[17]

The event that led to Mr Hogg being injured was foreseeable.[18]

The Federal Court imposed a **$110,000** fine on John Holland Pty Ltd.

Enforceable Undertakings

The JHG had given undertakings following their failure to comply with the minimum standards for providing safe workplaces to their employees as far back as 2007.

- on 4 June 2007 during an upgrade of the St Kilda Light Rail an employee lost two fingers in a workplace accident. The undertaking given included a commitment to conduct audits of their occupational health and safety performance and report the results of these to Comcare.
- on 25 August 2007 an apprentice boilermaker, Jack Wilmot, was left unsupervised and sustained a crushing injury to his left index finger.

The Problems Continue - First Criminal OHS Prosecution

In June 2016, John Holland pleaded guilty in the Adelaide Magistrate's Court to two charges of failing in its work health and safety duty during construction of the city's South Road Superway, in an incident that endangered the lives of two Adelaide motorists. A 40 kilogram section of concrete pipe broke off and fell around 15 metres into evening peak hour traffic. The pipe snapped because it was not properly supported.

The company was convicted and fined **$130,000** in what was the first criminal prosecution brought by federal regulator Comcare under the Commonwealth Work Health and Safety Act

The Court found John Holland did not carry out a risk assessment for the job or ensure the work was done safely, exposing the drivers to the risk of serious injury or death.

One month later, Hollands were back in the Magistrate's Court arguing that three new charges involving a collision between a gantry crane and an elevated work platform should be thrown out because of technical deficiencies.[19]

All of these deaths and injuries have been found by courts to be directly attributable to their failure to discharge their duty of care to their employees.

Early in 2016, the JHG Comcare licence was extended by the SRCC for another eight years. The CFMEU opposed the extension of the licence. No reasons were given for the decision to extend it.

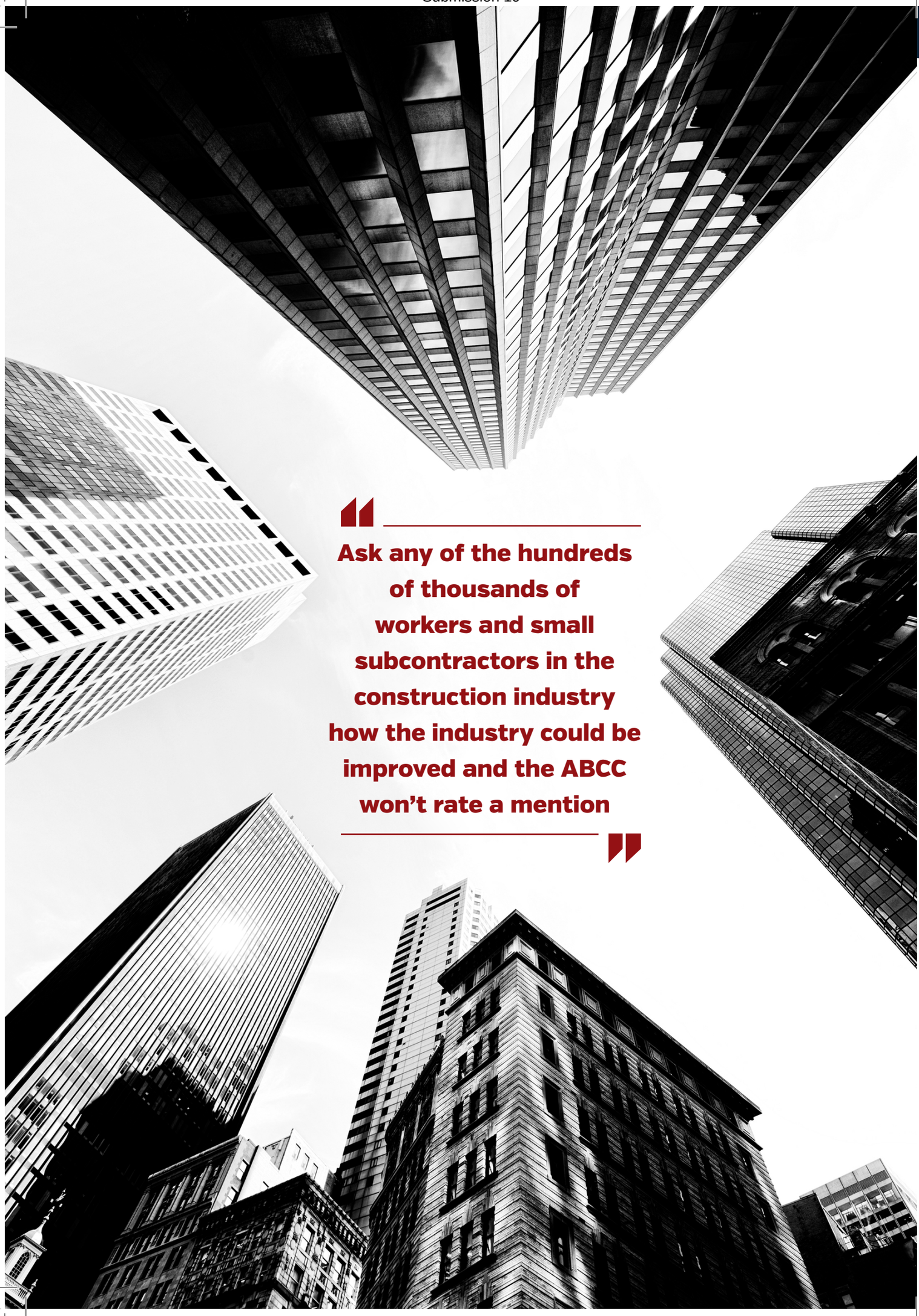
Safety – An Industry Priority

In the 10 years from 2003 to 2013, 401 construction workers died from injuries sustained at work. Although construction has about 9% of the national workforce, it accounts for 15% of all workplace fatalities.

In the year in which the ABCC was introduced, 2005, the number of workplace fatalities in construction was 30. It has exceeded that number (and the number in 2004 (35)), every year between then and 2012. The fatality rate (per 100,000 workers) has followed a similar pattern, only dipping below the 2005 rate in 2012.[20]

From 2000-01 to 2012-13, on average, every day, 35 employees in the construction industry suffered injuries serious enough to require one or more weeks off work.[21] The number of workers injured in the construction industry who did not return to work at all after their injury (12%) is four times the percentage of those workers in all industries.

15. Judgment at [15].
16. Id at [17].
17. Id at [16].
18. Id at [38].
19. http://www.adelaidenow.com.au/news/south-australia/john-holland-pty-ltd-claims-fatal-flaw-in-comcare-allegations-over-2013-crane-crash-at-angle-park/news-story/c76e800d6c41d2427f59c2502e866240
20. Safe Work Australia – Work-Related Traumatic Injury Fatalities Report 2014 – October 2015.
21. Safe Work Australia – Work-Related Injuries and Fatalities in Construction 2003 to 2013, June 2015.



Ask any of the hundreds of thousands of workers and small subcontractors in the construction industry how the industry could be improved and the ABCC won't rate a mention

Whilst there has been a reduction in the frequency rate of serious injuries over that period consistent with a reduction in the all-industries rate, a number of factors need to be kept in mind. Firstly, the number of serious claims actually grew by 13% in the same period and secondly, the rate of decline in the incidence rate has *decreased* since 2005 by comparison with the 2002-03 to 2004-5 period.

Make no mistake – when workers are faced with huge fines and a politically motivated 'watchdog' that prosecutes workers and unions, but not employers, they will think twice about taking action to fix safety problems.

Safety in the construction industry will suffer if this Bill is passed.

2. COERCIVE POWERS AND 'HONEST POLITICS'

The ABCC Bill will establish another Federal Government body with coercive powers to force ordinary citizens to attend and answer questions under oath and provide information and documents.

There is an expanding number of government bodies that have coercive information-gathering powers like these. In a 2007 paper, the Australian Law Reform Commission listed **forty five** different agencies in the Commonwealth jurisdiction alone that had coercive powers.

But the powers these bodies have are not all the same.

For example, the Australian Electoral Commission (AEC) also has coercive powers which are different to the 'ABCC' powers.

The AEC powers were used against a trust fund set up by former Prime Minister Tony Abbott called "Australians for Honest Politics."

The 'Australians for Honest Politics' trust was established to challenge the validity of the Queensland registration of the One Nation Party but was also allegedly used to bankroll court proceedings by dissident One Nation members.

One of these dissidents was said to have provided a statutory declaration to the AEC saying that Mr Abbott had arranged for $10,000 to be paid into a solicitor's trust account to cover costs arising in his litigation against One Nation.

The trust raised in the order of $100,000 but the trustees refused to disclose the details of who had donated to the trust.

The AEC used its coercive powers to try to find out whether the trust had made gifts for the benefit of a political party (the Liberal Party) which were required to be disclosed under the Commonwealth Electoral Act. The AEC came to the view that there was enough material to enable it to require that the financial records of the trust, including the names of the donors and the amounts donated, should be disclosed. It issued a coercive notice requiring disclosure to be made.

However Mr Abbott, a Minister at the time, objected to releasing the material in June 2004. According to media reports, he asked the AEC to review its decision, saying it was unreasonable on two grounds: that the trust was not an entity associated with the Liberal Party and the unfairness of requiring disclosure of donors six years after the trust was established.

Ultimately the AEC did not press the notice and no disclosures were ever made. One media report said that the AEC official who decided not to proceed with the notice did not have legal qualifications.

What then are the differences between these coercive powers which apply to political entities and donations and those proposed in the ABCC Bill and are these differences justified?

Firstly, the penalties for non-compliance with these coercive powers are different: a six month term of imprisonment under the ABCC Bill, but only $1,000 under the Commonwealth Electoral Act.

Secondly, under the Electoral Act the notices must include a reference to a right to review for the person served with the notice. A person who requests a review cannot be taken to have failed

to comply with a notice until a review is carried out and a decision provided.

It was this 'right of review' that Abbott's "Australians for Honest Politics" relied on to get out of having to provide the information that the AEC required. There is no equivalent in the ABCC Bill.

Also, under the ABCC Bill the right to rely on the privilege against self-incrimination in refusing to respond to a coercive notice is overridden by the ABCC Bill. The Electoral Act contains no equivalent provisions.

Why should construction workers be faced with much harsher coercive powers than those given to the democratic watchdog, the AEC, to ensure that our system of political donations is open and honest and that political parties do not engage in dodgy backdoor practices to attack their political opponents.

Why should politicians impose a different standard on ordinary workers to those that apply to them and to our electoral system generally?

3. ENTERPRISE AGREEMENTS AND THE BUILDING CODE 2013.

In May 2016, without any explanation, the Minister for Employment announced that the function of assessing the content of enterprise agreements for compliance with the Building Code 2013 would be moved away from the Department and given to the Fair Work Building Commission (FWBC).

Previously, any agreement approved by the Fair Work Commission was considered to be compliant with the Code.

Now, this extra layer of 'assessment' means the FWBC can 'rule' that the content of an agreement is inconsistent with the Code. A company with a non-compliant agreement is ineligible for federal government construction work even though the agreement has been approved by the Fair Work Commission.

This has added unnecessary complexity and cost for small and medium businesses and has delayed the agreement-making process to crawl.

It has also created absurd results as the FWBC rule some clauses are now 'non-compliant' even though they were previously acceptable under the Code and the terms of the Code itself have not changed. There have even been cases where a company's agreement has been rejected because of a clause that was exactly the same as a clause in another agreement that had been found to comply with the Code.

These FWBC assessments, some of which are taking months to obtain, are clearly wrong but the FWBC's aim is to stop as many agreements being approved as possible until the new 2014 Code can be pushed through.

Businesses are afraid to challenge this 'assessment' process because they will be blacklisted by the Government and lose the ability to tender for and work on government jobs.

Here are just a few recent examples of FWBC 'assessments' of agreement clauses that can disqualify a company from tendering for Commonwealth work:

(a) A perfectly reasonable clause that said:-

> *"In the event of a dispute about the operation of this clause, the parties shall use their best endeavours to settle the dispute at the workplace level in the first instance and if not resolved may thereafter refer the matter to the Fair Work Commission (FWC) to determine…"*

was held by FWBC to be inconsistent with section 17(2) of the Building Code which requires that there be the ability for employees to appoint a representative in relation to the dispute.

(b) A security of employment clause that said:-

> *"No employee shall be made redundant whilst labour hire employees, contractors and/or employees of contractors, engaged by X, are performing work that is or has been performed by the Employees on the particular site or project."*

was held to be inconsistent with the Code's objective to promote fair, cooperative and productive workplace relations in the building and

construction industry. In other words, although this didn't breach any specific requirement in the Code, someone at the FWBC decided that it didn't promote fair workplace relations.

The very same clause has appeared in hundreds of agreements approved by the Fair Work Commission and was approved by a Full Court of the Federal Court of Australia back in 2012.[22]

(c) A clause that said:

> *If the Union disputes that the employer will be ineligible to tender for government work due to a term of this Agreement, then the Employer or Union may notify the Fair Work Commission of a dispute regarding the Agreement and seek for it to be resolved by the Commission pursuant to clause 7 of this Agreement*

was held to be inconsistent with the objectives of the Code by the FWBC as 'the Fair Work Commission does not have jurisdiction over government tendering decisions.'

(d) A dispute settlement clause that said:

> *It is agreed between the parties that in the settlement of a dispute where it is identified that the Company is in minor/technical default with Award, Agreement or statutory obligations (e.g. under payment or non-payment of entitlements) there will be no stoppage of work whilst the breach is under investigation.*

was assessed by FWBC as 'non-compliant' because it confined the prohibition on stoppages of work 'to situations where the Company is in minor/technical default of entitlements,' and therefore 'implicitly failed to extend the prohibition on stoppages in respect of other types of breach.'

These kinds of decisions wouldn't survive for a second if they were put before any court or tribunal. But the union-busters at the FWBC are using this process to hold up lawfully negotiated agreements. This is exactly why the Government gave the Code assessment job to them.

The rules about the content of enterprise agreements are clearly set out in the Fair Work Act. It is the independent umpire, the Fair Work Commission, not the politically motivated FWBC, that should decide what can be included in an agreement.

4. WHAT ARE THE REAL ISSUES IN THE CONSTRUCTION INDUSTRY?

Ask any of the hundreds of thousands of workers and small subcontractors in the construction industry how the industry could be improved and the ABCC won't rate a mention.

The real issues are things like security of payment for small subbies and suppliers, abuse of power by major contractors, including unfair and unconscionable contracts, delayed payment, bogus disputed progress payments, insolvency, breach of director's duties, phoenix operators, sham contracting, underpayments, poor safety standards, a declining skills base and drop in apprenticeship numbers.

Some of these issues were recently highlighted by the Senate Committee report into insolvency in the industry.[23]

In summary, the Committee found:

- The commercial construction sector has serious imbalances of power in contractual relationships. Harsh, oppressive and unconscionable commercial conduct and a growing culture of sharp business practices are rife. This has distorted the construction market by concentrating market power at the top of the contracting chain and reallocating risk from the large principal contracting companies to those who are least able to bear it, namely subcontractors, small suppliers and employees.

- A large number of smaller scale subcontractors that carry the burden of risk, and a concentration of market power in the hands of a few major corporate head contractors means that those head contractors often

22. Australian Industry Group v Fair Work Australia [2012] FCAFC 108

23. http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Insolvency_construction/Report

have little regard for the competitive pressures placed on subcontractors.

- The industry is particularly prone to corporate insolvencies. Its insolvency rate is out of proportion to its share of national output. Over the past decade the industry has accounted for between 8 per cent and 10 per cent of annual GDP and roughly the same proportion of total employment. But over the same period, the construction industry has accounted for between 20% and 25% of all insolvencies in Australia.

- As a result, the industry is burdened every year by nearly $3 billion in unpaid debts, including subcontractor payments, employee entitlements and tax debts averaging around $630 million a year for the past three years.

- The economic cost of insolvencies in the construction industry is staggering. In 2013–14 alone, ASIC figures indicate that insolvent businesses in the construction industry had, at the very least, a total shortfall of liabilities over assets accessible by their creditors of $1.625 billion.

- The construction industry consistently rates as either the highest or second highest as against all other industries when it comes to unpaid employee entitlements.

- The Commonwealth's taxpayers have paid out over $226 million in the period 2009-10 to September 2015 to employees of insolvent companies just in the construction industry, through the Fair Entitlements Guarantee Scheme.

- 'Phoenixing' is a major concern in the construction industry. The Committee found sections of the industry in which some company directors consider compliance with the corporations law to be optional, because the consequences of non-compliance are so mild and the likelihood that unlawful conduct will be detected is so low.

- This culture is reflected in the number of external administrator reports indicating possible breaches of civil and criminal misconduct by company directors in the construction industry. Over three thousand possible cases of civil misconduct and nearly 250 possible criminal offences under the Corporations Act 2001 were reported in a single year in the construction industry alone. This suggests an industry in which company directors' contempt for the rule of law is becoming all too common.

- Despite the number of breaches in the construction industry, the disqualification of directors sanction has been used by ASIC as the exception rather than the rule, with an average of only 69 directors, across all industries, disqualified per financial year.

- Insolvency is hindering innovation and productivity improvements. Businesses are operating in an environment in which non-payment for work carried out is commonplace, cash flows were uncertain and businesses lower down in the subcontracting chain have little power relative to those at the top of the chain. In this environment, there is very little incentive to invest the necessary capital to adopt new and innovative construction methods, invest in new capital equipment or invest in workforce skills development.

The Committee's Report noted that the Australian regulatory response to these issues, particularly in relation to security of payment for smaller subcontractors, was fragmented and inadequate. The Report called for the national harmonisation of these laws noting that:

> *"The continued viability of the industry in its current structure requires Commonwealth intervention to ensure that businesses, suppliers and employees that work in the industry's subcontracting chain get paid for the work they do."*

To achieve this, the Report recommended the Commonwealth enact uniform, national legislation for a security of payment regime and rapid adjudication process in the commercial construction industry.

This recommendation in relation to security of payment was the first of two major recommendations that the Committee itself described as *"a sea change in the Commonwealth's role in regulating payment practices in the construction industry."*

The second aspect of these proposed major reforms was a recommendation that, commencing in July 2016, the Commonwealth would commence a two year trial of Project Bank Accounts on construction projects where the Commonwealth's funding contribution exceeds ten million dollars.

The Report went on to recommend that, following the successful completion of a trial of Project Bank Accounts on Commonwealth funded projects, the Commonwealth should legislate to extend the use of a best practice form of trust account to private sector construction.

Subcontractors and workers in the construction industry are up in arms about the insolvency and security of payment problem. It has led to personal bankruptcies, family breakdowns, homelessness countless job losses and millions in lost entitlements.

Even though the Report had bipartisan support, nothing has been done to implement its recommendations.

Despite all the rhetoric about 'mum and dad operators' and concern for small business, the Turnbull Government and major employer organisations do nothing to address these issues, choosing instead to argue for the anti-union ABCC.

They will do nothing to tackle the real problems because their big political donors, the property developers, major contractors and big material suppliers, like things just the way they are.

CFMEU

Senate Education and Employment Legislation Committee

Building and Construction Industry (Improving Productivity) Bill 2013

and the

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

SUBMISSION BY THE

AUSTRALIAN MANUFACTURING WORKERS UNION,

AUSTRALIAN WORKERS UNION,

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION

AND THE

TRANSPORT WORKERS UNION OF AUSTRALIA

19 February, 2016

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1. Introduction

The Federal Government has recently reintroduced the *Building and Construction Industry (Improving Productivity) Bill 2013* and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013* (the Bill/s) into the Parliament.

These Bills are in identical terms to Bills rejected by the Senate in 2014 after an inquiry and report by this Committee.[1]

If approved, the reintroduced 2013 Bills will:

1. re-name the Fair Work Building Industry Inspectorate (FWBC)[2] as the Australian Building and Construction Commissioner (ABCC);
2. remove safeguards on the coercive powers which are currently available to the FWBC;
3. include industry specific laws relating to unlawful industrial action, coercion, discrimination and unenforceable agreements; and
4. impose higher civil penalties for contraventions of industrial laws.

The Federal Government also intends to make major changes to the rules applying to construction projects that are funded by the Commonwealth. In the Second Reading Speech for the Bills, the Government confirmed that its 2014 *Building and Construction Industry (Fair and Lawful Building Sites) Code*[3] was to take effect at the same time as the 'new ABCC' started to operate.[4] The Bills and the new Code must therefore be considered as a single package of 'reforms'.

The construction unions opposed these Bills when they were introduced over two years ago. We refer to and rely on the union submissions made to this Committee and the Education and Employment References Committee, in 2013-14. We maintain our opposition to the Bills.

The Government places some reliance on the Final Report of the Heydon Royal Commission to support the passage of these Bills. However, a close reading of the Heydon Royal Commission Report shows that this reliance is entirely misplaced and misleading. In fact, the recommendations in the Report contradict the most fundamental features of these Bills.

The Heydon Report specifically considers, and **rejects, the idea of creating industry-specific legal restrictions.** It also concludes that different penalties

[1] See http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/ABCC_2013. The Education and Employment References Committee also considered the Bills in early 2014 - http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/ABCC_Reference
[2] Strictly, the name under the *Fair Work (Building Industry) Act* 2012 is Fair Work Building Industry Inspectorate (FWBII). See s 26J. FWBC is the acronym adopted by the inspectorate.
[3] Released April 2014, amended September 2014
[4] 2 February 2016, page 10.

should **not** be included in legislation that applies to just one industry. These are central features of the Bills. Both elements are repudiated by the Heydon Royal Commission Report.

The Royal Commission Report has weakened, not strengthened the case for the passage of these laws.

This submission, made on behalf of the Australian Manufacturing Workers Union, the Australian Workers Union, the Construction, Forestry, Mining and Energy Union and the Transport Workers Union of Australia, deals with the most common arguments put forward to support the ABCC laws. When the arguments are considered, it can be seen that these are not laws to improve the industry or balance the interests of those who work within it. Rather, they are politically-driven laws designed to attack construction unions and their members and promote the economic interests of large construction companies and property developers at the expense of workers' rights.

The Government has failed to demonstrate why proposed laws which were rejected less than two years ago should now be approved.

The Senate should again reject the Bills.

2. We Need to Re-introduce the ABCC as the Construction Industry 'Watchdog'

We already have a 'watchdog'.

The construction industry 'watchdog' was never abolished. The ABCC was simply re-named 'FWBC' in 2012 as part of the changes made by the previous Government following a review by former Federal Court judge, Hon. Murray Wilcox QC.

When its name changed, the FWBC **retained** its strong investigative powers, including the power to compel people to attend interviews and answer questions (or face a possible six months imprisonment) and to hand over documents.

Those powers have existed since 2005 and were extended last year for a further two years.[5]

The Heydon Royal Commission Final Report does not recommend the passage of the Bill. It recommends the continuation of an industry-specific regulator.

> *Recommendation 61*
>
> *There should continue to be a building and construction industry regulator, separate from the Office of the Fair Work Ombudsman, with the role of investigating and enforcing the Fair Work Act 2009 (Cth) and other relevant industrial laws in connection with building industry participants.*[6]

The Bills do not need to be passed to achieve this outcome.

This is not a case of choosing whether to have a powerful regulator or not. We already have the FWBC, which is separate from the FWO. It is has both the power and the resources[7] to investigate and prosecute breaches of industrial laws.

[5] *Construction Industry Amendment (Protecting Witnesses) Act 2015*
[6] Chapter 8, paragraph 112
[7] The FWBC has significant public resources at its disposal. Total FWBC income increased from $29.780m in 2013-14 to $34.792m in 2014-15. It has 146 staff.

3. We Need the ABCC to Clean up Criminality and Corruption in the Construction Industry

The ABCC/FWBC has never had any role in investigating breaches of the criminal law. It deals with possible industrial law contraventions, which are and always have been civil, not criminal matters. This Bill would not change that situation at all.

The Government, the FWBC and sections of the media are trying to give the public the impression that a new ABCC would tackle criminality in the construction industry. For example the Explanatory Memorandum for the Bill refers to violence and thuggery as reasons why the Bill should be passed. The second reading speech does this as well.

A page 1 story in 'The Australian' newspaper on 15 October 2015 declared that the FWBC had dealt with *'1000 crimes on building sites'* in a year. In fact, no crimes were involved at all. Even the 948 supposed (civil) contraventions of workplace laws referred to, was baseless.

The FWBC Director was forced to reluctantly concede in Senate Estimates that the figure of 948 referred to the number of *complaints* that had been received by the FWBC and investigated. He said, '*It could be a complaint about a drainpipe over someone's back fence.*'[8]

The ABCC/FWBC has no role in investigating or prosecuting violence, extortion or any of the other forms of criminality that have been reported in the media or referred to by politicians.

The current FWBC Director has confirmed this position. In Senate Estimates last year he said criminal matters were '*not within our purview*'.[9] In 2014 he told Estimates if the FWBC comes across criminal conduct they refer it to the police.[10] He told the media last year *'The FWBC does not prosecute these matters.'* [11]

The Bill does not confer a criminal law enforcement role on the new ABCC. As the previous Minister pointed out in his submission to this Committee in the 2014 inquiry, '*The ABCC's role under the Bill will be to regulate workplace relations."*[12]

[8] Nigel Hadgkiss – Senate Estimates – 22 October 2015.
[9] Estimates 22/10/15 at 107.
[10] Estimates 23/10/14, pg 85:
[11]] http://www.heraldsun.com.au/news/law-order/labor-leader-daniel-andrews-under-pressure-as-kickback-allegations-claim-senior-cfmeu-scalp/story-fni0fee2-1226811620548
[12] Submission pg 9

Criminal matters are properly dealt with by the existing laws and criminal law enforcement agencies. The FWBC already has the ability to refer possible criminal behaviour to the police.

The Heydon Royal Commission made a number of referrals to various prosecuting authorities, including the FWBC, for those authorities to consider. That is not to say that each referral amounted to a contravention of the law. As the Commission report itself noted:

> *A referral may be made to the prosecuting authorities, but the grounds for a referral are quite different from the grounds on which a court might convict.*[13]

Possible contraventions of the criminal law were referred to the relevant agencies – Directors of Public Prosecutions and the police. A number of referrals for possible *industrial* contraventions were made to the FWBC. Exactly how many of these will ultimately lead to court proceedings and of those, how many will result in a court concluding that a contravention has occurred, is impossible to say. This is because Royal Commission conclusions or 'findings' emerge from a very different process to court proceedings. The Heydon Royal Commission Report put it this way:

> *Notions of a 'fair trial', however rhetorically appealing, do not apply to commissions of enquiry including this Royal Commission. Criminal trials involve a final adjudication of guilt. Commissions of inquiry have a duty to inquire.*

In any event, even if this Bill had been passed in 2014 it would have made no difference to the way Royal Commission referrals were dealt with. The FWBC is not a prosecuting authority for criminal contraventions and nor would the ABCC be either.

It is manifestly untrue and completely misleading to say that a new ABCC will deal with criminal matters.

These Bills are not about corruption either. As the ACTU's submission to this Committee makes clear, a completely different legislative response is required if Parliament wants to address corrupt conduct. No doubt proper, non-politicised anti-corruption measures would have widespread community support, including from the trade union movement.

However these are not anti-corruption Bills. They deal with the regulation of industrial relations and industrial rights.

[13] Volume 4 paragraph 197.

4. The New ABCC will be independent and politically neutral. It will prosecute employers too.

Just like its predecessor (and the current FWBC), the ABCC would focus on investigating industrial breaches relating to unions and workers.

From October 2005 until June 2011 the ABCC brought a total of 86 prosecutions against unions and union officials. This compared to a mere 5 prosecutions against employers in the same period. In the period 1 July 2009 to 30 June 2010 there were 29 prosecutions brought against unions and union officials and *none* against employers.

The FWBC does not deal with employer breaches like underpayment of wages and 'phoenix' companies, even though the laws under which it is established requires it to enforce laws applying to *ALL* building industry participants.

Section 10 of the *Fair Work (Building Industry) Act* 2012 says it is the function of the Director of the FWBC to promote and monitor compliance with designated building laws by 'building industry participants'. Section 4 defines building industry participant to include *employers* in the building and construction industry.

On his appointment in October 2013, and despite the clear terms of the Act, the current FWBC Director announced that, just like the original ABCC, the FWBC would no longer pursue breaches by employers of industrial awards and agreements such as underpayment of wages and entitlements to employees. He told Senate Estimates these employer breaches of the industrial law, were not the FWBC's 'core business'.

The failure of the ABCC/FWBC to pursue employee entitlements and prosecute employers who engage in breaches of industrial law, and the Government's failure to direct them to do so,[14] directly contradicts the recommendations of the Cole Royal Commission. Cole recommended that the ABCC adopt a *greater* role in the enforcement of employee entitlements,[15] provide representation for employees who had been underpaid[16] and even monitor and report on mechanisms that would improve this process for employees.[17] None of that has happened.

[14] The Minister can make such a direction - see section 11 *Building and Construction industry Improvement Act* 2005 and *Fair Work (Building Industry) Act* 2012.
[15] Recommendation 157 Final Report Volume 1.
[16] Recommendation 159 Final Report Volume 1.
[17] Recommendation 163 Final Report Volume 1.

Observance of awards and enterprise agreements by employers is a serious problem in the construction industry.

When the FWBC *was* pursuing underpayments for a short period prior to October 2013, many breaches of industrial laws by employers were uncovered. For example, in the 2012-2013 reporting period, the FWBC recovered wages and entitlements totalling $1,622,853.89 for 1363 construction workers.[18] In that year, the greatest number of investigations of all categories, 31%, were undertaken in the area of wages and employee entitlements.

Despite abdicating responsibility for the enforcement of employee wages and entitlements[19], the FWBC makes the extraordinary claim in its Annual Report that *'the FWBC acts impartially and does not single out any industry participant.'*[20]

By unilaterally deciding to opt out of its statutory obligation to pursue employers who underpay their workers, the FWBC allows itself more time and resources to pursue the prosecution of unions and workers.

Employer Breaches

The FWBC does deal with one form of employer breach – those relating to the *Building Code* 2013 (the Code) – in a very limited way. The Code is a legally binding legislative instrument approved by Parliament. Breaches or suspected breaches must be notified to the FWBC within 21 days.[21]

But these employer breaches are handled by the FWBC offering 'advice, assistance and education', rather than the banning or restricting of companies from Federal Government projects, or the punitive court proceedings which they regularly pursue against unions and workers. The most recent FWBC Annual report says:

> *Where breaches of the Building Code were identified, contractors were given advice and assistance to rectify the potential breaches and the necessary reform was initiated*[22].
>
> *In each instance where non-compliance was identified, rectification was achieved through correspondence and education of the contractor.*[23]

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[18] Annual Report 2012-2013 page 31.
[19] Which are automatically referred to the FWO.
[20] Op cit, page 14.
[21] Section 22 Building Code 2013
[22] At page 39.
[23] At page 40.

In its 2015 submission[24] to the Senate Economics References Committee inquiry into insolvency in the Australian construction industry the CFMEU pointed out:-

- According to external administrators' reports lodged with ASIC, **unpaid employee entitlements** of companies in the construction industry experiencing an insolvency event in 2013-14 alone amounted to almost $57 million at the lower end, up to a median amount of almost $137 million.

- ASIC administrators' reports put the figure of **unpaid taxes** and charges for **construction industry companies** for 2013-14 at a lower end figure of $178 million to a median amount of $487 million(in round terms)

- More than three quarters of all administrators' reports lodged in 2013-14 identified some form of **civil or criminal misconduct by insolvent companies and their directors**. The construction industry accounted for more than 20% of these. In that year alone, there were 2393 potential breaches of the general fiduciary duties of directors and the duty to prevent insolvent trading, reported for the construction industry.

- There has **not been a single prosecution** taken under s 596AB of the *Corporations Act* – a section directed to agreements or transactions that prevent the recovery, or reduce the amount of, recoverable employee entitlements.

- The Federal Government has recently **cut ASIC's funding** by $120 million over a four year period. In the current financial year it will lose 12% of its operating budget and 209 staff. By contrast, the Government has **increased funding for the FWBC.**

- Across its entire area of corporate and marketplace responsibility, ASIC obtained civil **penalties against companies/directors** of just over $3 million in the six months to December 2014. FWBC obtained $2.26 million in penalties, **mostly against unions and workers**, in the 2013-14 financial year.

Prosecuting Workers

Over three hundred and fifty ordinary construction workers are currently facing prosecution by the FWBC.

In 2013, the FWBC concluded a prosecution against 117 construction workers in Western Australia over an industrial dispute that took place in 2008. The workers

[24] http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Insolvency_construction/Submissions

were fined in excess of $1 million in total. The findings of contraventions against unions and officials were overturned on appeal.[25]

In at least four matters to date, the FWBC has commenced proceedings against approximately 145 individual workers, only to discontinue the case against those workers at a later date.[26]

[25] [2013] FCA 942

[26] See BRG318/2014, BRG894/2014, BRG 312/2015 and WAD 98/2015

5. The Building Industry Watchdog Needs Stronger Powers to Deal with Unlawful Behaviour.

The current FWBC *already has* coercive powers that are unparalleled for an industrial regulator anywhere else in the world.

After it was renamed FWBC, it retained the power held by the ABCC to compel people to attend and answer questions without the ability to refuse on the grounds of self-incrimination.[27] This power abrogates the fundamental common law privilege against self-exposure to penalties and forfeiture.[28]

The FWBC Director maintains that coercive interviews are *'a critical tool in breaking down the walls of silence in the industry.'*[29] This oft repeated claim is simply a very poor political justification for the existence of these extraordinary powers. It is false because:

- Construction industry employers have never shown any reluctance to resist union claims or oppose union policies. Many are openly hostile to unions. Employers regularly oppose union claims and use industrial tactics and the courts and industrial tribunals, to pursue their case without any fear or hesitation about how unions will react. There is no reason why the situation would be any different for employer engagement with FWBC. In fact, it is very common for employers to call the FWBC in the union's presence to get the FWBC's advice and assistance to resist or obstruct union claims. The 'wall of silence' is a myth.

- It is very easy for someone who wanted to assist an FWBC investigation to do so confidentially. Even if a person who met with FWBC confidentially to provide information was later to give evidence in court, they could be required to do so by subpoena and therefore be seen to be doing so under legal compulsion.

- For production of documents, there is already a compulsory power available under the *Fair Work Act*.[30] Failure to comply with this power results in the imposition of civil penalties. The deterrent effect of civil penalties for non-compliance provides a sufficient level of compulsion, irrespective of whether the person receiving the notice does or does not want to hand over the material. An additional criminal offence for non-production is completely unnecessary, excessive and oppressive in the extreme.

[27] Section 52 *Fair Work (Building Industry) Act* 2012
[28] *Sorby v Commonwealth* (1983) 152 CLR 281 and 292 (Gibbs CJ) and 309 (Mason, Wilson and Dawson JJ); *Australian Crime Commission v Stoddart* (2011) 244 CLR 554 at [186] (Crennan, Kiefel and Bell JJ).
[29] At page 15.
[30] Section 712 *Fair Work Act* 2009

Aside from these coercive powers, the FWBC also has the full range of powers available to the Fair Work Ombudsman. The construction unions routinely comply with notices from FWBC requiring production of documents. There have been no prosecutions against unions or union members for failing to comply with them.

The civil penalties supporting the power to require production of documents and records is an adequate deterrent against non-compliance and has worked effectively since the *Fair Work Act* was introduced in 2009.

FWO inspectors (including those from FWBC appointed as Fair Work inspectors) currently have the power to:-

- inspect any work, process or object,
- interview any person,
- require a person to tell the inspector who has custody of, or access to, a record or document,
- require a person who has custody of, or access to, a record or document, to produce the record or document to the inspector
- inspect, and make copies of, any record or document that is kept on the premises or is accessible from a computer that is kept on the premises;
- take samples of any goods or substances in accordance with any procedures prescribed by the regulations.

FWBC inspectors would continue to have and use these powers whether the Bill passes or not.

6. The Bill is Needed to Strengthen the Current Coercive Powers

The Bill does not 'strengthen' the existing coercive powers at all.

What the Bill does is strip away the few safeguards that were recommended by the Wilcox Review to protect people who are interrogated and forced to answer questions.

- Under the current Act, a presidential member of the Administrative Appeals Tribunal may, after being satisfied of certain minimum requirements, authorise a coercive notice before it is given to a member of the public.

  Under the Bill, the ABCC Director authorises the notices him/her self.

- Under the current Act, notices can only be authorised where other methods have been tried and were unsuccessful, or are not appropriate in the circumstances.[31]

  Under the Bill, coercive notices can be used by the ABCC as a first resort.

- Under the current Act, the person being interrogated is entitled to be legally represented by the lawyer of their choosing.[32]

  Under the Bill, the person being interrogated can choose to be legally represented[33] but do not have a right that it will be by the lawyer of their choosing.[34]

- Under the current Act, a person who is subjected to a compulsory interrogation is entitled to claim reasonable expenses, including legal expenses,[35] for attending.

  Under the Bill, there is no ability to claim for legal expenses.[36]

- Under the current Act, a person cannot be directed not to discuss the details of interrogation with any other person, including their family members.[37] This ensures that people interrogated by officials of the State

[31] S 47(1)(d)
[32] S 51(3)
[33] S 61(4)
[34] See s. 61 of the Bill, the *Building and Construction Industry Improvement Act* 2005 and the decision in *Bonan v Hadgkiss (Deputy Australian Building and Construction Commissioner)* **[2006] FCA 1334**
[35] Section 58
[36] Section 63
[37] Section 51(6)

are able to report and seek advice on measures adopted and used by officials during interrogations.

Under the Bill, that important protection is removed. A 'non-disclosure order' of this kind imposed on those who are interrogated by the ABCC is oppressive and unnecessary. No such restrictions are imposed on suspects in serious criminal matters.

- Under the current Act a person does not have to disclose information if the information is subject to legal professional privilege or where public interest immunity applies.[38]

  These core common law rights are not contained in the Bill.

It is imperative that safeguards on these powers be maintained, not removed. No cogent reason has ever been advanced for affording those suspected of breaching industrial laws with fewer rights than the most egregious criminals.

The Heydon Royal Commission Final Report said that suggestions that regulators overreach or abuse coercive powers are rare.[39] Unfortunately this is not so in the case of the ABCC.

The ABCC coercive powers have been seriously misused. This is not a mere suggestion, but a court finding.

In *Commonwealth Director of Public Prosecutions v Tribe (Ark)*[40] the Court held that the Notice issued by the ABCC to construction worker Ark Tribe, was defective. After a lengthy and costly trial where Mr Tribe faced possible imprisonment, he was acquitted of the charge of failing to attend a coercive interview.

Since the *Tribe* decision, the ABCC/FWBC has confirmed that all 203 coercive notices issued from October 2005 until the date of the *Tribe* decision on 24 November 2010, suffered from the same defect as the Tribe notice.[41]

The ABCC therefore engaged in significant and sustained conduct that was beyond its powers and which subjected a substantial number of people to coercive interrogations when it had no legal foundation for doing so.

[38] S 52(2)
[39] Volume 8, paragraph 145.
[40] *File No: MCPAR-09-2146 Magistrates Court SA*
[41] Senate Standing Committee on Education Employment and Workplace Relations Questions on Notice Budget Estimates 2011-2012 Question No.EW0119_12

Disturbingly, ABCC prosecutions proceeded on the basis of information or material obtained by it through the use of defective s 52 notices[42] and evidence obtained by this means was admitted in court proceedings.[43] The only advice provided by the ABCC to people issued with one of the 203 defective notices was to contact one of them and tell them that the interview was not going ahead.[44]

The Heydon Royal Commission Report neglected to mention these issues.

[42] Ibid Question No.EW0121_12
[43] Ibid Question No EW0122_12
[44] Senate Standing Committee on Education Employment and Workplace Relations Questions on Notice Question No.EW0124_12

7. We need the separate, additional laws for the construction industry in this Bill to control industrial behaviour in the industry

The Heydon Royal Commission Final Report rejected this idea.

In fact, after a lengthy analysis, the Heydon Report said that there should **NOT** be separate laws for the construction industry. It concluded as follows:

> *186. There is, however, merit in **uniformity of substantive industrial laws**, even where there is a need for specific regulatory enforcement.*[45] (emphasis added)

> 187. *Subject to certain matters, the building specific industrial laws proposed in the Building and Construction Industry (Improving Productivity) Bill 2013 (Cth) are very similar to those established by the FW Act. This suggests that **rather than having separate legislation governing building industry participants, the provisions of the FW Act should apply to building industry participants, but that amendments to the FW Act are necessary to deter unlawful conduct within the building and construction industry.***

The coverage of these Bills is intentionally *extended* beyond that which applied under the previous ABCC legislation. This is done by extending the definition of 'building work' to off-shore operations and by including the transport or supply of goods used in building work. More employees and employers would therefore be covered by these laws than has ever previously been the case. This makes the problem of non-uniformity of industrial laws identified by the Heydon Report worse. It would also create further arguments about the boundaries of the laws and whether the different industrial rights that exist for those covered by the laws apply at all.

Picketing

The Bill includes a new prohibition on certain forms of picketing.

An unlawful picket is defined to include any action that is industrially motivated and directly restricts persons from accessing or leaving a building site, *or has that purpose.* It follows that for picketing to be unlawful, it does not actually have to restrict or prevent in any material way, access or egress to a building site. Any group of persons, including members of the general public, who have assembled with the purpose of preventing or restricting access, where that purpose is industrially motivated, would be infringing the provision and be exposed to fines and injunctions irrespective of whether they had actually done anything to restrict

[45] Volume 8.

access. The mere *organising* of such action is also deemed to be unlawful, even before persons physically assemble.

The new restrictions may include conduct such as peaceful assemblies and the conveying of information to persons entering or leaving a building site. Thus even action that is not unlawful at common law and action which is motivated by an otherwise perfectly lawful industrial purpose will be caught by these provisions.

The Statement of Compatibility with Human Rights which is annexed to the Explanatory Memorandum concedes that *'The right to freedom of peaceful assembly is limited by the prohibition on unlawful picketing that is contained in s. 47 of the Bill*.'

The Heydon Report rejected the idea that a picketing restriction should only apply to the construction industry.

> 190. *Picketing involving obstruction and besetting is tortious at common law. It is highly anomalous if Fair Work Commission cannot stop that kind of tortious industrial conduct when it can make stop orders under s 418 in relation to other types of industrial action.* ***Again, rather than having special building industry legislation, the FW Act should deal specifically with industrially motivated picketing.***

Coercion and Discrimination

All of the additional sections in the Bill dealing with coercion and discrimination are already covered by the *Fair Work Act* 2009.

The proposed section 52 of the Bill relates to coercion in the allocation of duties to particular persons. This is already dealt with by s. 355 of the FW Act. The MBA conceded as much in relation to the equivalent provision, s. 43 of the BCII Act, during the Wilcox Inquiry.[46] The Explanatory Memorandum acknowledges that the FW Act prohibitions are in similar terms.[47] The proposed section is entirely unnecessary.

The proposed section 53 refers to coercion in relation to superannuation. Again, the Wilcox Report concluded that the equivalent provision of the BCII Act, s. 46,

[46] Final Report 4.74
[47] Para 142.

was already covered by the provisions of s. 343 of the FW Act.[48] This is still the case.

The proposed section 54, which is in similar terms to s. 44 of the BCII Act, is covered by the provisions of ss. 340 and 343 of the FW Act. Wilcox analysed these provisions and expressly reached that conclusion.[49] Again, the Explanatory Memorandum acknowledges that the FW Act prohibitions are in similar terms.[50]

The proposed section 55 is in similar terms to what was contained in the BCII Act. As was found by the Wilcox Report,[51] the FW Act prohibition in s 354 covers this situation. Once again the Explanatory Memorandum acknowledges the repetition.[52]

The Wilcox Report disposed of the arguments about the need to retain additional penalty provisions from the *BCII Act* once and for all. It concluded that each of the provisions was already comprehensively dealt with in the *Fair Work Bill* (now the *FW Act*) and that there was no need to carry any of them forward.

By concluding that there should be uniformity of industrial laws rather than 'add-ons' for particular industries, the Heydon Royal Commission Report provides no support whatsoever for these aspects of the Bill and a strong in-principle reason why they should never become law.

[48] Final report 4.80
[49] Final report 4.75 to 4.78
[50] Para 156.
[51] At 4.79
[52] At 158.

8. Higher penalties are needed to deter unlawful action in the construction industry.

Levels of industrial action in the construction industry, like all other industries, are at historically low levels and have been for a number of years.

Even official figures for industrial action overstate the issue because those figures do not distinguish between 'protected' industrial action, which is perfectly legal and recognised in the *Fair Work Act* as a legitimate element of the collective bargaining system, and other forms of industrial action.

The *Wilcox Report* dealt with the argument that the construction industry is unique in its vulnerability to industrial action.

> *'....it is necessary to remember there are many other industries in which industrial action may cause great loss to an employer, and even the national economy, and/or considerable public inconvenience. One has only to think of the major export industries, most components of the transport industry, the gas and electricity industries, the telecommunication industry and emergency services such as police, ambulances and hospitals.* ***There is no less need to regulate industrial action in those industries than in the building and construction industry. Recognising the serious consequences of industrial action in virtually any industry, the Fair Work Bill proposes a number of severe constraints upon its occurrence.***

The rationale for the higher penalties for the construction industry comes from the Cole Royal Commission. However Commissioner Cole also recommended that the maximum penalties for *employers* who breach awards and agreements by underpaying employees their lawful entitlements should be increased to the same level as those for industrial action.[53] That recommendation was ignored by the Coalition Government. The result was that from the time when the ABCC legislation was introduced in 2005 until 2012, workers were exposed to far higher penalties than employers for contravening industrial laws.

The proposition that one industry should be singled out for higher penalties for industrial conduct contravenes the fundamental principle of equality before the law. As the Wilcox Report concluded:

> *'I do not see how (the history of the building and construction industry) can justify... the contravener... being subjected to a maximum penalty greater than would be faced by a person in another industry, who contravened the same provision and happened to be brought to justice. To do that would depart from the principle... of equality before the law.*

[53] Recommendation 165, Volume 1 Final Report.

It would be anomalous and unfair in the extreme to reintroduce higher penalties into one industry and impose them on workers and unions who operate in that industry.

9. The ABCC will deliver/has delivered economic benefits to the community.

The ABCC has cost Australia taxpayers over $250 million since it was set up in 2005. There is no firm evidence to show that it has delivered any tangible benefits to the industry or the Australian economy more generally. It has, since its inception and continues to engage in a union-busting campaign at an ongoing cost to the public of around $30 million a year.

The FWBC has significant public resources at its disposal. Total FWBC income increased from $29.780m in 2013-14 to $34.792m in 2014-15. It has a total of 146 staff.

Yet the Government claims that there is a compelling economic case for the passage of the Bill.

The so-called economic case for the ABCC was totally demolished by the submissions made on the Bills during the 2013-14 Senate Committee inquiries.

Heavy reliance for the 'improved productivity' argument is placed on an analysis originally undertaken by Econtech (now Independent Economics) which were commissioned, variously, by the ABCC and the Master Builders Association.

These self-serving reports have been widely criticised by a range of people, including Hon. Murray Wilcox QC who described the report as 'deeply flawed' and said it 'ought to be totally disregarded'[54], as well as various academics and economic writers.

A report by PriceWaterHouseCoopers (PwC) in October 2013 on Productivity in the Construction Industry described the reports as *'found wanting on a number of methodological grounds',* with no discernible contribution having been made by the ABCC to productivity in the construction industry. Rather, data used in the PwC report demonstrates that construction industry labour productivity has grown steadily since at least 1994-95 and appears to be broadly consistent with comparable industries.

The Econtech Reports are the source of figure that the ABCC and the 'industry reform package' of the Howard Government was responsible for a 9.4% productivity improvement across the industry. The method used in the Reports to produce this figure was to simply compare the costs of completing standard tasks (e.g. laying concrete) in the less unionised housing sector against the more unionised commercial construction sector, as though union density were the only feature which distinguishes the two sectors.

[54] Wilcox, M. '*Transition to Fair Work Australia for the Building and Construction Industry'* (Report March 2009) at 5.48.

The Reports also argued that the data demonstrated that productivity in the industry during the 'ABCC period' was higher than that which could be predicted as being the case without the ABCC, based on the broader national productivity figures.

Professor David Peetz's submissions to the 2013-14 Senate inquiries show that *not only* was there no evidence of costs narrowing between the two sectors since the establishment of the ABCC, but if anything, the gap slightly widened.[55]

Further, on closer analysis the Econtech Reports do not provide any evidence that supports the hypothesis that the introduction of the ABCC had any impact on improved productivity in the construction industry. This because the Econtech methodology fails to take into account the effect on the 'all industries' productivity figures of unusually low productivity in the mining and utilities sectors.

When actual construction industry labour productivity (as opposed to some predicted figure generated by an economic model) is compared with national productivity figures, Professor Peetz's submission shows that for most of the 'ABCC reform period' it lagged behind national levels, a trend which was only reversed in 2011-12 after the ABCC began making less frequent use of its coercive powers.[56]

Professor Peetz was able to conclude:

> *'Overall, then, construction industry labour productivity followed a path broadly comparable to that of the rest of the economy.* ***There was no magical 9.4 per cent increase in productivity as a result of the ABCC or other reforms,*** *and no equally magical 7 per cent drop in productivity (75 per cent of 9.4 per cent) evident as a result of the FWBC coming into effect.*
>
> *The Reports' claims of productivity gains from the use of coercive powers are also not borne out and nor are they discernible in ABS or Productivity Commission data.*
>
> *In short, if 'economic case' refers to productivity gains, there is no economic case for the reinstatement of the ABCC. If, however, the aim is to increase the share of income going to profits, or reduce it going to wages, then that is an 'economic' objective that would be served by the reintroduction of an institution that may more*

[55] Submission 8 Page 3.
[56] Ibid, p 7.

> *effectively use coercive powers against workers. If this is the aim, however, it should be more clearly stated.'* (emphasis added)

The Heydon Final Report contributes very little to the 'economic' debate. It simply recites the conclusions of the 2014 Productivity Commission Report,[57] which offers no comfort at all to the proponents of the 'ABCC = greater productivity' argument:

> *…..when scrutinised meticulously, the quantitative results provided by [Independent Economics] and others* ***do not provide credible evidence that the [Building Industry Taskforce]/ABCC regime created a resurgence in aggregate construction productivity*** *or that the removal of the ABCC has had material aggregate effects. Indeed, the available date suggests that the regime did not have a large aggregate impact.*[58] (emphasis added)

[57] Productivity Commission Inquiry into Public Infrastructure, *Inquiry Report*, 27/5/14
[58] Quoted at paragraph 92, Volume 5 Chapter 8 Final Report

10. Even if the Bill limits human rights or contradicts international labour standards, those limitations are 'reasonable, necessary and proportionate.'[59]

The building industry laws have, on no less than eight separate occasions, been found by the ILO's *Committee of Experts on the Application of Conventions and Recommendations* and the *Committee on Freedom of Association* to be contrary to core International Labour Conventions to which Australia is signatory.

As early as 2005, the ILO's Committee on Freedom of Association noted:

> *'As for the penalty of six months' imprisonment for failure to comply with a notice by the ABCC to produce documents or give information, the Committee recalls that penalties should be proportional to the gravity of the offence and requests the Government to consider amending this provision.'*

In February 2010 the Committee of Experts said:-

> *'The Committee considers that the prosecution of workers does not constitute part of the primary duties of inspectors and may not only seriously interfere with the effective discharge of their primary duties – which should be centred on the protection of workers under Article 3 of the Convention – but also prejudice the authority and impartiality necessary in the relations between inspectors and employers and workers. This is even more so when the laws on the basis of which the workers are prosecuted have been repeatedly found by this Committee to be contrary to other international labour standards, notably Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and Right to Organise and Collective Bargaining Convention, 1949 (No. 98).'*

In February 2011 the Committee reiterated its previous conclusions:-

> *'Noting with concern that the manner in which the ABCC carries out its activities seems to have led to the exclusion of workers in the building and construction industry from the protection that the labour inspection system ought to secure for these workers under the applicable laws, the Committee urges the Government to ensure that the priorities of the ABCC (or the Fair Work Building Industry Inspectorate) are effectively reoriented so that labour inspectors in the building and construction industry may focus on their main functions in full conformity with Article 3(1) and (2) of the Convention.'*

It is important to have regard to international obligations that have been voluntarily assumed by Australia in deciding the fate of the proposed laws. A

[59] See *Statement of Compatibility with Human Rights* annexed to the Explanatory Memorandum, final paragraph.

reversion to the 'ABCC laws' will inevitably bring Australia back into conflict with the most fundamental of internationally accepted labour standards.

It is not as though the Federal Government is proposing to introduce laws that have never been tested against international standards. These laws have already failed to measure up to these standards.

It is extraordinary that the Government is promoting these laws yet again, despite the strident and sustained international condemnation they have already received.

11. Building and Construction Industry (Fair and Lawful Building Sites) Code 2014

On 17 April 2014, the Coalition Government published an "Advance Release" of the *Building and Construction Industry (Fair and Lawful Building Sites) Code 2014* ("the new Code"). A revised version was published on 28 November 2014. The new Code is designed to replace the current Building Code 2013, which is a legislative instrument that came into effect on 1 February 2013.

The new Code is said to be made pursuant to section 34 of the Bill, and provides that it takes effect at the same time as section 3 of the Bill. In considering whether or not to approve the Bills, the Senate also needs to have regard to the effect of the new Code, because the Government has said these are a package of 'reforms' that will operate concurrently.[60]

Because the new Code depends on the passage of the Bill into law for it to come into effect, it currently has no status beyond that of an expression of the Executive Government's preferred form of regulation for federally funded construction sites.

Nonetheless, the Government has tried to maximise the new Code's impact on enterprise bargaining in the construction industry. It has done this by publicly indicating that once the new Code comes into effect, all agreements struck after the 24 April 2014 must comply with its terms or companies will be ineligible for Commonwealth funded work.[61] This introduces an element of potential retrospectivity into agreement-making which is damaging and unfair; parties can negotiate an agreement that complies with the law in all respects, including the *Fair Work Act* and the 2013 Code, but have no way of knowing whether or not the Bill (and the new Code) will pass through parliament and render their agreement 'non-compliant', causing potentially significant financial detriment by rendering them ineligible for Commonwealth government work.

The new Code would severely impede the capacity of workers to negotiate terms favourable to them in enterprise bargaining agreements. It introduces wide-ranging restrictions on the content of agreements, above and beyond the limitations in the *Fair Work Act* 2009. Mostly these limitations are imposed under the guise of the *'right of the code covered entity to manage its business or to improve productivity'*.[62]

There are at least seventeen types of clauses which are not permitted to be included in agreements listed in the new Code, regardless of the wishes of the

[60] 'A new statutory code has been developed that is intended to commence at the same time as the re-established Australian Building and Construction Commission'. Second Reading Speech 2 February, 2016, page 10.
[61] See media release Minister Abetz 17 April, 2014.
[62] Section 11(1)(a)

agreement making parties. The list is not exhaustive. These proscriptions are not imposed on employees and employers in any other industry.

Examples of clauses which would be prohibited under the new Code are:

- clauses which require the employment of a certain number of apprentices in relation to the number of tradespeople employed.

- clauses that require employers to make reasonable efforts to attract job candidates from amongst suitably skilled Australian citizens or permanent residents before engaging foreign visa holders.

- clauses that place some limits on the number of casual employees as a proportion of the workforce.

- clauses that protect the employment security of employees by requiring that employees of businesses to whom work is contracted out be paid no less than the rates and conditions of permanent employees.

- clauses placing reasonable limits on the amount of overtime required to be worked based on health and safety considerations.

- clauses that permit union officials to come onto site to assist with a dispute settlement process, or (most extraordinarily and in curtailment of a property owner's right to invite people onto their premises as they see fit) at the invitation of the employer.

- clauses that require employees to only perform tasks that are able to be safely performed having regard to their skills/competencies/experience.

- clauses that provide for consultation with unions or their delegates or members about the use of subcontractors.

- clauses that limit the 'cashing-out' of entitlements through the use of 'rolled-up' rates of pay.

- clauses that allow the Fair Work Commission to arbitrate a dispute outcome which is not consistent with the new Code.

- clauses that try to overcome the prohibitions in s 11 by rendering offending clauses inoperative.

Practices which do not allow for flexibility around operational requirements, such as a rostered day off schedule, are also prohibited even if they are not contained in an agreement clause.

The absurdity of these restrictions is highlighted by the fact that clauses which allow union members and delegates to undertake site induction processes are also prohibited,[63] even though it is a general occupational health and safety requirement that all persons at a workplace be properly inducted.

The new Code also elevates the status and power of the proposed ABCC by making it not just the monitor and investigator of potential Code Breaches, but the decision-maker, with the power to impose heavy commercial sanctions such as exclusion from Commonwealth projects.[64] Decisions about whether or not the wording of particular clauses of enterprise agreements fall within or outside the very broad prohibitions set out in section 11 – for example, on the basis that a clause limits the 'right of a (code covered entity) to manage its business' – are also to be made, 'conclusively', by the ABCC under the new Code.[65]

[63] Section 11(1) Example 2.
[64] See Sections 18 and 19.
[65] Section 22.

12. Conclusion

The Australian public accepts that employer and employee interests can diverge in the workplace and that disputes can arise. They have also observed federal workplace law as a hotly contested political battleground for many years and no doubt accept that there are many different views about the laws that should regulate our workplaces.

It is likely that very few people would disagree with the notion that ideally, an industrial system should offer everyone a 'fair go all round.'

The ABCC laws, which date back to 2005, represent the last and most extreme vestiges of the *WorkChoices* era. The 2013 Bills are an attempt to revive those laws and to breathe life back into an approach to workplace relations that was roundly rejected by the Australian electorate.

These Bills revert to the notion that it is acceptable to single out a sector of the community and allow them fewer workplace rights (and greater exposure to penalties) than the remainder of the general public.

They attempt to normalise the existence of a publicly funded and politicised regulator with invasive powers - which are without precedent in an industrial relations context - being permitted to devote their resources to employee and trade union prosecutions.

They expose a Government that is utterly dismissive of the international authorities who have examined the laws and found that they fall short of the internationally recognised labour standards that Australia has voluntarily agreed to meet.

Perhaps worst of all, and to the discredit of those who have been a party to this campaign, these Bills rely on a deliberate political strategy of confusing industrial and criminal behaviour and the promotion of the idea that these laws are necessary because for some reason which is never articulated, the existing criminal laws and law enforcement agencies are inadequate.

The Bills represent the antithesis of 'a fair go all round' in the workplace.

The AMWU, AWU, CFMEU and TWU oppose these Bills and urge the Committee to recommend that the Bills be rejected by the Senate.