



**Australian Government**  
**Department of Employment**

Your Ref  
Our Ref

Deputy Secretary  
Sandra Parker

Committee Secretary  
Senate Education and Employment Committee  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

Dear Secretary

**Building and Construction Industry (Improving Productivity) Bill 2013 [No.2] and Building  
and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [No.2]**

I am writing in relation to the Committee's inquiry into the Building and Construction Industry (Improving Productivity) Bill 2013 [No 2] and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [No 2] (the ABCC Bills).

Attached is the Department of Employment's submission to the December 2013 (department's 2013 submission) inquiry into the ABCC Bills by the Committee. As the reintroduced Bills are in exactly the same form as those introduced in 2013, the content of the department's 2013 submission remains relevant, and is attached for the Committee's information.

However, since the Committee's inquiry into the ABCC Bills in December 2013, there have been other inquiries into matters relevant to the building and construction industry, including the Royal Commission into Trade Union Governance and Corruption and the Productivity Commission's Inquiry into Public Infrastructure, which support the need for the passage of the ABCC Bills. This letter therefore provides supplementary information on these inquiries for the Committee's consideration. Further information on safety in the building and construction industry is also provided to the Committee due to this issue featuring prominently in debates and commentary on the ABCC Bills.

### **Royal Commission into Trade Union Governance and Corruption**

In the final report of the Royal Commission into Trade Union Governance and Corruption released in December 2015, Justice Dyson Heydon stated that<sup>1</sup>:

*A great deal of the evidence before the Commission concerned the activities of unions with coverage of workers in the building and construction industry, and in particular the Construction, Forestry, Mining and Energy Union (CFMEU). The conduct that has emerged discloses systemic corruption and unlawful conduct, including corrupt payments, physical and verbal violence, threats, intimidation, abuse of right of entry permits, secondary boycotts, breaches of fiduciary duty and contempt of court.*

*The issues identified are not new. The same issues have been identified in reports of three separate Royal Commissions conducted over the past 40 years: the Winneke Royal Commission in 1982, the Gyles Royal Commission in 1992 and the Cole Royal Commission in 2003....The continuing corruption and lawlessness that has been revealed during the Commission suggests a need to revisit, once again, the regulation of the building and construction industry.*

In considering the arguments for and against industry specific industrial laws, Justice Heydon concluded:

*The argument for them is that the culture of lawlessness that exists in the building and construction industry differentiates that industry from other employment areas. The existence of that culture justifies differential treatment, either by introducing specific laws concerning building action or having higher penalties.<sup>2</sup>*

*There is an obvious need for laws that ensure an effective deterrent against unlawful conduct. In an environment where union officials openly acknowledge that they will take industrial action to achieve the union objectives without regard to whether that action might break the laws governing protected and unprotected industrial action, there is a need for laws that expressly address what is prohibited conduct and provide strong penalties for contravention of them.<sup>3</sup>*

*It is apparent from the matters canvassed....that the present penalties are an ineffective deterrent to unlawful conduct on the part of the construction unions, and judicial officers have noted that the CFMEU appear to regard financial penalties as simply a business cost like any other.<sup>4</sup>*

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<sup>1</sup> Royal Commission into Trade Union Governance and Corruption, December 2015, Final Report, Volume 5, Chapter 8, paras 1-3.

<sup>2</sup> Royal Commission into Trade Union Governance and Corruption, December 2015, Final Report, Volume 5, Chapter 8, para 157.

<sup>3</sup> Royal Commission into Trade Union Governance and Corruption, December 2015, Final Report, Volume 5, Chapter 8, para 185.

<sup>4</sup> Royal Commission into Trade Union Governance and Corruption, December 2015, Final Report, Volume 5, Chapter 8, para 187.

Justice Heydon recommended there should continue to be a building and construction industry regulator, separate from the Office of the Fair Work Ombudsman, with the role of enforcing the *Fair Work Act 2009* (Cth) and other relevant industrial laws in connection with building industry participants (Recommendations 61 and 65).

He also recommended that the *Fair Work Act 2009* (Cth) be amended:

- to increase the maximum penalties for contraventions of ss 343(1), 348 and 355 (coercion) and ss 417(1) and 421(1) (prohibited industrial action) to 1,000 penalty units for a contravention by a body corporate and 200 penalty units otherwise; and
- to provide that picketing by employees or employee associations is 'industrial action', and to deal specifically with the consequences of industrially motivated pickets. (Recommendation 66)

#### *Compulsory information gathering powers*

Much debate and commentary about the ABCC Bills has focused on compulsory information gathering powers of a re-established Australian Building and Construction Commission (ABCC). Justice Heydon has addressed this issue at length at paragraphs 143 to 155 of Volume 5, Chapter 8 (Building and Construction) of his report. Justice Heydon notes that many of the claims made in opposition to the use of compulsory information gathering powers are 'legally exaggerated or misleading or utterly unrealistic'.<sup>5</sup>

Justice Heydon also recommended that legislation be enacted conferring the building industry regulator with compulsory investigative and information gathering powers equivalent to those possessed by other civil regulators and that there should be Commonwealth Ombudsman oversight of those powers. Justice Heydon stated that the powers set out in the Building and Construction Industry (Improving Productivity) Bill 2013 appear appropriate in this regard. (Recommendations 62 and 63)

The department's 2013 submission at paragraphs 40 to 49 outlines a number of protections available to individuals required to comply with compulsory notices. The ABCC Bill contains a number of safeguards to ensure that the process is implemented appropriately, including any information given by a witness cannot be used against the witness, witnesses are given written notice and can have a lawyer present, are paid conduct money, proceedings are recorded, and the process is subject to oversight by the Commonwealth Ombudsman. The full range of protections is provided at Attachment A.

It has been said that such powers are only used against terrorists. That is not the case. These kinds of powers are granted and regularly used by a range of other Commonwealth civil regulatory bodies, such as the Australian Competition and Consumer Commission, the Australian Taxation Office, the Australian Securities and Investments Commission, Medicare, Centrelink, the Fair Work Commission and the Australian Prudential Regulation Authority. As Justice Heydon noted, most of the compulsory information gathering powers of these

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<sup>5</sup> Royal Commission into Trade Union Governance and Corruption, December 2015, Final Report, Volume 5, Chapter 8, para 146.

regulators are exercisable in relation to suspected contraventions of legislation that attract only civil consequences, as is the case with the ABCC Bills.<sup>6</sup>

Justice Heydon also said any comparison with the powers exercised by ASIO is misleading. ASIO powers are far more invasive of private rights and require greater oversight, namely the issuing of a warrant. He said in respect of terrorism offences that the ASIO powers include the power to require a person to attend immediately for questioning and to detain persons for up to a continuous period of 168 hours.<sup>7</sup>

### **Productivity Commission Public Infrastructure Inquiry Report**

The Productivity Commission, in its 2014 report following its Public Infrastructure Inquiry, also recommended that the Australian Government retain separate regulation for the building and construction industry. The Productivity Commission also recommended that the Australian Government:

- should increase the ceiling of penalties for unlawful industrial relations conduct in the construction industry; and
- ensure that the specialist regulator has adequate resources to give genuine and timely effect to the enforcement regime. (Recommendation 13.2)

### *Productivity*

The department's 2013 submission at paragraph 16 states that, while the ABCC existed, the productivity of the building and construction industry significantly improved. Australian Bureau of Statistics (ABS) data supports this for the period 2005 to 2012. The ABS data, *Estimates of Industry Multifactor Productivity*, show that from 2004-05 (the year before the ABCC began operating) to 2011-12 (its final year of operation):

- the labour productivity index for the construction industry rose from 83 to 100 which represents a 20 per cent increase. In contrast, the 16 Market Sector industries index rose from 90 to 100, which represents an 11 per cent increase.
- the multifactor productivity index for the construction industry rose from 89 to 100 which represents a 12 per cent increase. In contrast, the 16 Market Sector industries index fell from 102 to 100.

The same data also show that, following the abolition of the ABCC, both labour productivity and multifactor productivity in the construction sector have remained flat.

### *Industrial action*

In reaching its conclusion that separate building industry regulation should be retained by the Government, the Productivity Commission's Public Infrastructure Inquiry report noted the 'long and unfortunate history of unlawful behaviour by employers and unions' in the building and construction industry.

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<sup>6</sup> Royal Commission into Trade Union Governance and Corruption, December 2015, Final Report, Volume 5, Chapter 8, para 129.

<sup>7</sup> Royal Commission into Trade Union Governance and Corruption, December 2015, Final Report, Volume 5, Chapter 8, para 152.

The Productivity Commission report also highlights how the ABS data on industrial disputes exclude many aspects of worksite industrial disputation, such as work-to-rules, go-slows and overtime bans. The measurement is working days lost, which means that short disruptions which may be very costly are not counted. The ABS data also does not measure the flow-on effects of disputes in locations other than where the stoppages physically occur, such as stand-downs due to lack of materials, pickets, disruption of transport services and power cuts, despite these having effects on the utilisation of labour and capital.

The Productivity Commission concludes in its report that, in relation to this sector, 'the available industrial dispute data may therefore underestimate the prevalence and severity of industrial relations disharmony'.<sup>8</sup>

The ABS data on industrial disputes in the building and construction industry show:

- in the five years from 2000 to 2005, the industrial dispute rate in the construction sector was five times the all industries average. The quarterly average industrial dispute rate in the construction industry was 56.7 working days lost per 1000 employees (WDL/000E) compared with the 'all industries' average rate of 10.4 WDL/000E.
- from 2005 to 2012, during the operation of the ABCC, the rate of disputes in the construction industry (9.6 WDL/000E) dropped to twice the 'all industries' average rate (4.2 WDL/000E).
- since 2012, the construction industry dispute rate (12.5 WDL/000E) has risen to four times the 'all industries' average rate (3.0 WDL/000E).

### **Safety in the Building and Construction Industry**

The safety record of the building and construction industry during the period of the ABCC's operation has also featured prominently in debates and commentary on the ABCC Bills.

The CFMEU has consistently and publicly claimed that there was a significant rise in workplace fatalities during the years the ABCC operated and also a significant decrease in workplace fatalities the year it 'closed'. These statements incorrectly imply that the ABCC stopped workers and unions from raising safety issues. They also misrepresent the data on safety in the building and construction industry.

The *Building and Construction Industry Improvement Act 2005* then, and the ABCC Bills now, contain no provisions that would prevent legitimate safety issues in the building and construction industry from being raised and addressed by employees, unions, or work health and safety regulators.

Workers and unions, with or without the ABCC, should raise work health and safety issues on building sites with state and territory work health and safety regulators.

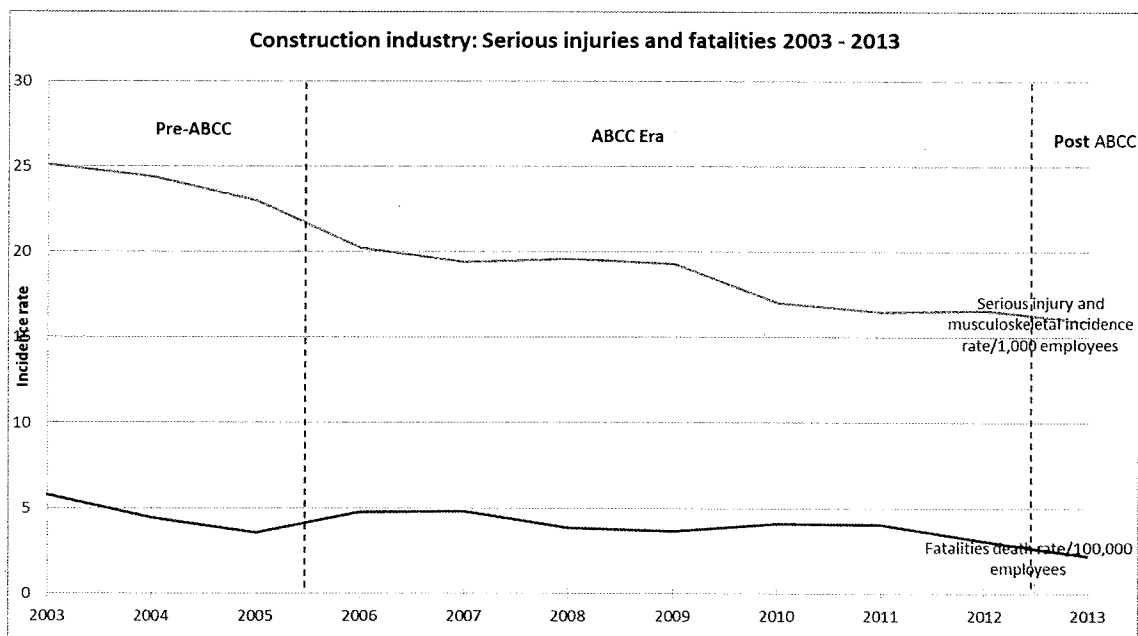
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<sup>8</sup> Productivity Commission Public Infrastructure Inquiry, May 2014, p540.

The Australian Government recognises that the building and construction industry is higher risk than most other industries. In response to the recommendations of the 2003 Cole Royal Commission, it established the Federal Safety Commissioner and the Australian Government Building and Construction WHS Accreditation Scheme. The scheme allows the Government to use its power as a purchaser of construction projects to require best practice safety standards from any building company that it contracts with to undertake work. The scheme is run by the Department of Employment and has been operating successfully for ten years. Scheme-accredited builders have lower rates of fatalities and injury than the industry as a whole. The ABCC Bills continue the operation of the scheme.

The role of the ABCC was to regulate workplace relations to maintain the rule of law and drive productivity. There is no truth in the claim that the rate of serious injuries and fatalities increased during the period it operated.

Safe Work Australia is an independent body comprising representatives from the Australian Government, state and territory governments, unions and employers. It collects and publishes national data on workplace injuries and fatalities and is the authority on these issues. Safe Work Australia's data<sup>9</sup> show that the incidence rate of serious injuries (that is claims per 1000 employees) fell throughout the period of the ABCC (2005-12). While the number of fatalities did increase in 2006 and 2007 when compared to 2005 (as shown in Table 1), this reflected in part a particularly low number of fatalities in the construction industry in 2005 and a growing number of persons employed in the industry.



<sup>9</sup> Safe Work Australia, *Work-related injuries and fatalities in construction, Australia, 2003 to 2013*, June 2015

Safe Work Australia's Work-related Traumatic Injury Fatalities Report 2014, released in October 2015, also shows that the fall in work-related fatalities in the building and construction industry, while volatile, is greater than the fall observed across Australian industries as a whole. This suggests that the various safety initiatives undertaken within this industry have had an impact on work health and safety outcomes.

Fatality rate (Deaths per 100,000 workers)<sup>10</sup>

	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Construction	5.77	4.42	3.56	4.77	4.81	3.85	3.66	4.11	4.04	3.05	2.18	2.98
All industries	2.75	2.97	2.60	2.80	2.96	2.62	2.38	2.06	1.99	2.01	1.71	1.61
No. Construction worker fatalities	43	35	30	43	45	38	36	41	41	30	22	31
Number of construction workers (millions)	0.753	0.799	0.855	0.915	0.951	0.998	0.996	1.017	1.033	1.000	1.029	1.046

I trust this further information will assist the Committee in its consideration of the ABCC Bills.

The Department is happy to assist the Committee with further data or evidence on request.

Yours sincerely

Sandra Parker

19 February 2016

<sup>10</sup> Safe Work Australia, *Work-related Traumatic Injury Fatalities Report 2014*, October 2015

Attachment A

## Compulsory Examination Powers Protections

<b>Building and Construction Industry (Improving Productivity) Bill 2013</b>
<b>Notice to attend - s 61(2)</b> A person required to attend an examination has at least 14 days written notice that they will need to appear and there is an ability to set an alternative time.
<b>Right to representation – s 61(4)</b> A person required to attend an examination is entitled to be represented by a lawyer.
<b>Reasonable expenses reimbursed – s 63</b> A person required to attend an examination will be reimbursed for their reasonable expenses including travel, accommodation and lost earnings.
<b>Protection from liability – s 103</b> A person who discloses information in good faith under an examination notice is protected from proceedings for contravening any other law and from civil action for damages because of that disclosure.
<b>Privilege against self-incrimination/ Use/derivate use indemnity – s 102(2)</b> Although a person cannot refuse to provide information, answers or produce records and documents on the grounds that it might incriminate them or contravene another law, any information, answers or documents obtained as a result of an examination notice is inadmissible in almost all criminal or civil court proceedings against them.
<b>Legal professional privilege</b> <b>Public interest immunity</b> No express abrogation of legal professional privilege or public interest immunity.
<b>Ombudsman oversight – ss 64 and 65</b> <ul style="list-style-type: none"> <li>• Ombudsman notified of issuing of notice</li> <li>• all examinations are videotaped and a video and transcript of the examination is given to the Commonwealth Ombudsman</li> <li>• Ombudsman is required to report to Parliament at least annually on the exercise of the powers.</li> </ul>
<b>Protection of information – s 106</b> Certain public officials must keep any information acquired under an examination notice confidential. Also information obtained through the examination process can only be disclosed in very limited circumstances.
<b>Review</b> A decision to issue an examination notice by the Commissioner of the ABCC would be reviewable in the Federal Court under s 39B of the Judiciary Act 1903 (Cth) for jurisdictional error.