Senate Education and Employment References Committee

Governments approach to re-establishing the Australian Building and Construction Commission

Submission by the Australian Mines & Metals Association (AMMA)

January 2014

AMMA is Australia's national resource industry employer group, a unified voice driving effective workforce outcomes. Having actively served resource employers for more than 95 years, AMMA's membership covers employers in every allied sector of this diverse and rapidly evolving industry.

Our members include companies directly and indirectly employing more than half a million working Australians in mining, hydrocarbons, maritime, exploration, energy, transport, construction, smelting and refining, as well as suppliers to these industries.

AMMA works with its strong network of likeminded companies and resource industry experts to achieve significant workforce outcomes for the entire resource industry.

First published in 2014 by

AMMA, Australian Mines and Metals Association

GPO Box 2933

Brisbane, QLD, 4001

Contact: Scott Barklamb - Executive Director, Policy and Public Affairs

Email: policy@amma.org.au

Phone: 07 3210 0313

Website: www.amma.org.au

ABN: 32 004 078 237

Contents

EXECUTIVE SUMMARY

- On 14 November 2013, the Senate referred the provisions of the *Building and Construction Industry (Improving Productivity) Bill 2013* and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013*, to the Senate Education and Employment Committee for inquiry and report by 2 December 2013.

- On 25 November the Australian Mines and Metals Association (AMMA) lodged a detailed submission to that inquiry (Attachment A) based on the provisions of the proposed legislation and the policy approaches being pursued.

- In this original submission, AMMA urged the Committee/Senate to proceed as follows:

  - AMMA and its members have consistently argued for the reinstatement of the ABCC as a matter of urgency.

  - The Committee in this inquiry, is dealing with a "known quantity" in the ABCC and in the formulation of this bill. The bill restores the vast bulk of the ABCC's former functions and powers, with some notable exceptions and necessary improvements.

  - Parliament is merely being asked to put back in place a previous, well proven regulator under nearly identical statutory arrangements. In that sense the Committee's work should be quite straightforward.

  - Notwithstanding that, AMMA has engaged with the provisions of the bill throughout this submission, highlighting the significance of key provisions of the bill.

  - (paraphrasing) Parliament has an opportunity to pass the bill(s) without delay.

- The AMMA position remains that there is a strong and compelling basis to pass the *Building and Construction Industry (Improving Productivity) Bill 2013* and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013,* and that this can and should occur without delay following the resumption of the Parliament in February 2014.

  - A significant error was made in deliberately emasculating a proven regulator that was efficiently and rigorously enforcing the rule of law in the Australian construction industry, and acting on clear areas of legal transgression.

  - The ABCC needs to be "put back" essentially as it was, to continue to deliver on its previous mandate. This is what the Royal Commission recommended, this is what works, and until this occurs Parliament is effectively condoning a level of unlawful conduct and disregard for the law which is not only highly economically damaging, but at odds with the interests and expectations of the Australian community.

- AMMA and others made submissions and participated in the previous inquiry process as directed by the Committee in November, and as submitted at that time, considers the previously convened inquiry provided a sufficient foundation for the passage of the amendments.

- AMMA makes no comment on the convening of this additional inquiry following a completed inquiry process, save to note that this further submission is restricted to the policy rationale and merits of the reintroduction of the ABCC as proposed by the government. The politics of the "*Governments approach to re-establishing the Australian Building and Construction Commission*" are not something AMMA can assist the Committee with.

- This short submission therefore augments our earlier substantive submission (Attachment A) which is re-submitted to inform this Committee's further considerations.

- Further input is restricted to the matters this Committee is to have further reference to (Terms of Reference (a) to (j)).

(a) IMPACT OF RESTABILISING THE ABCC

1. For the reasons set out throughout this submission, and in Attachment A, the Committee can and should conclude that the impact of restoring the ABCC will be positive.

2. The restored ABCC and BCI legislation will have the effects of:

   a. Providing an improved workplace relations framework for building work to ensure that building work is carried out fairly, efficiently and productively for the benefit of all building industry participants and for the benefit of the Australian economy as a whole.

   b. Improving the bargaining framework so as to further encourage genuine bargaining at the workplace level.

   c. Promoting improved respect for the rule of law.

   d. Ensuring respect for the rights of building industry participants.

   e. Ensuring building industry participants are accountable for unlawful conduct.

   f. Providing effective means for investigating and enforcing the Act, designated building laws (to the extent that those laws relate to building work) and the Building Code.

   g. Improving work health and safety in building work.

   h. Encouraging high levels of employment in the building industry.

   i. Providing improved assistance and advice to building industry participants in connection with their rights and obligations under this Act, designated building laws and the Building Code.

3. In considering the likely impacts of the proposed legislation, the Committee should take into account:

   a. This is not first time legislation, nor a proposal for a first time regulator.

   b. The ABCC with directly comparable powers and responsibilities operated very successfully between 2005 and 2012.

   c. The Committee can know exactly how a restored ABCC would operate and its impact, by looking to how the pre-2012 ABCC operated and its positive impact in the industry.

   d. On any realistic and non-partisan assessment, the impact of reintroducing the ABCC as proposed in the 2013 BCI Bills will be positive.

(b) NEED FOR A SPECIALIST INDUSTRY REGULATOR

4. The first 20 pages of Attachment A outline the basis for the restoration of the ABCC. We re-commend this material to the Committee, and note that it complements the input and experiences of other interested parties to the earlier inquiry.

5. In doing so, we recall in particular:

   a. A specialist industry regulator was specifically recommended by a Royal Commission, the highest form of inquiry in our legal system.

   b. The need for a specialist industry regulator was reconfirmed by the subsequent Wilcox review.

   c. The need for a specialist industry regulator was borne out by experience, with the ABCC addressing a substantial body of matters during its time and commencing a process of (sadly interrupted) cultural and attitudinal change.

   d. The need for a specialist regulator was acknowledged by the preceding government through the creation of Fair Work Building and Construction in 2012. The alternative of simply mainstreaming enforcement in the industry, with no specialist regulator was not pursued or seriously considered at any stage by labor in government, nor is it a serious consideration now.

6. The Committee can treat the case for a specialist industry regulator as having been made out, and can then concentrate on the question of which specialist regulator should address the rule of law in the industry.

7. For the reasons set out in Attachment A, augmented by this submission, this should be resolved in favour of restoring the ABCC and allowing it to again get on with the transformational work Royal Commissioner Cole specifically recommended.

(c) IMPACT ON PRODUCTIVITY

8. Paragraphs 64 to 77 of Attachment A outline various pieces of evidence highlighting the positive impact the ABCC had on productivity in the industry.

9. On the basis of such research, and the experiences and priorities of employers the Committee can take it as a near certainty that productivity will in time be higher under a restored ABCC with its full previous powers and resources, than it would be under the present deliberately emasculated arrangement following the *Fair Work (Building and Construction) Act 2012*.

10. The Committee should also reflect on the long standing commitment of employers to the restoration of the ABCC. ***Why are we employers so steadfast on this issue, and why are we so convinced the industry needs the ABCC?***

11. Employers seek to make money in productive, efficient enterprises – that just happen to also generate jobs, develop useful infrastructure etc.

12. Employers continue to support the restoration of the ABCC so strongly and persistently because it will deliver a more productive, competitive industry, which will be in our commercial interests.

13. Put aside any comic book notions that employers want to see unions destroyed, or are fighting an ideological battle – we have neither the time nor the motivation to pursue such outdated concepts.

14. However the Committee can look to the actions and priorities of employers, combined with the research and previous experiences, and conclude quite reliably that the ABCC will have a positive impact on industry productivity, with the various positive benefits this will yield for all concerned.

(d) INTERNATIONAL LAW OBLIGATIONS

The Committee has the information it needs

15. The Committee already has before it a detailed and comprehensive statement on the compatibility of the 2013 BCI bills with Australia's international law obligations (the statement of compatibility with human rights contained in the explanatory memorandum to the 2013 BCI bills). This addresses the compatibility of the bills with:

    a. Rights to freedom of association.

    b. Rights to safe and healthy working conditions.

    c. Rights to a fair trial.

    d. Rights to peaceful assembly.

    e. Rights to freedom of expression.

    f. Rights to privacy and reputation.

16. This material provides the Committee with a substantial basis to satisfy itself on the compatibility of these bills with human rights obligations (i.e. term of reference (d)).

International Labour Organisation (ILO)

17. There has been significant discussion on the compatibility of these bills with Australia's ratified obligations under ILO Conventions, principally the *Freedom of Association and Protection of the Right to Organise Convention, 1948* (No. 87) and perhaps also the *Right to Organise and Collective Bargaining Convention, 1949* (No. 98).

18. Whilst the material in the EM is centred on other UN instruments providing for comparable rights, the EM provides considerable information on the compatibility of these bills with rights to freedom of association, and thereby the ILO standards. You have before you material to discharge this concern and move to pass the bills.

19. Beyond that, we understand that the ACTU and construction industry unions intend to make a complaint using the supervisory machinery of the ILO. It is entirely up to our unions whether they make a complaint to the ILO's Committee on Freedom of Association (CFA) or using the general supervisory machinery, and in due course such a complaint will be become part of the ILO supervisory process and be responded to by the government.

20. Relevantly for this Committee:

    a. An ILO complaint is an allegation/claim, and remains to be made out. Union actions (current and foreshadowed) stand for no more at this stage than the fact that a complaint (i.e. an allegation) will be made.

    b. This Committee can gain no assistance on whether the bill should pass from a unilateral union decision to lodge a complaint (an action unions would have taken regardless of the form of the 2013 BCI bills).

    c. Such complaints commence a dialogue and an exchange of facts and elucidation between national capitals and Geneva, often over cycles of ILO processes (i.e. a few years). There is a long way to go with any ILO complaint before anything determinative could be taken from it at the domestic level regarding compatibility of this legislation with Australia's international obligations.

    d. Governments often maintain differences of opinion and interpretation with the various committees of the ILO as complaints are addressed, again often over periods of years. This is particularly true of industrialised countries' laws on collective bargaining and negotiation, and attempts by unions to make ILO complaints at least partially for strategic domestic political purposes.

    e. Ultimately, the ILO complaint mechanisms are also only semi/quasi determinative on any country's compliance with its treaty obligations. Any ultimate decision rests with the International Court of Justice, not the ILO.

Put this in context

21. The ACTU previously lodged a complaint against the BCII Act 2005 and the operation of the previous ABCC[1]. It alleged "*that the Building and Construction Industry Improvement Bill 2003 would affect: the right to strike of workers in that industry by extending the scope of unprotected industrial action and introducing significant penalties; and their right to bargain collectively by restricting the scope of bargaining, preventing "pattern bargaining", and making "project agreements" unenforceable*".

[1] Case No 2326 (Australia) - Complaint date: 10-MAR-04 The Australian Council of Trade Unions (ACTU) and supported by the Trade Unions International of Workers of the Building, Wood and Building Materials Industries (UITBB)

22. A dialogue was underway between Australia and the ILO supervisory machinery (in this case the Committee of Experts on the Application of Standards) on the compatibility not only of the previous BCII Act with ILO obligations, but also wider parts of the Australian workplace relations system, many of which have been retained under the Fair Work Act. This dialogue is simply likely to recommence following the planned restoration of the ABCC.

23. It is also worth recalling that the consistency of Australian labour law with ILO precepts has never been clear cut. Like many countries, Australia has never really engaged with the full range of apparent inconsistencies between our workplace laws and apparent or purported ILO treaty obligations (which are themselves heavily debated within the ILO and international legal services).

Conclusion

24. Australia's international obligations are very important in shaping many areas of our domestic laws, including in particular our labour laws. However, uniquely antipodean approaches to regulating work have never neatly equated with Eurocentric international labour standards. It has long been thus, and at this stage ILO standards are of little or no assistance to the Parliament as to whether to pass these bills and properly re-establish the ABCC.

25. More generally, AMMA can see no reason not to conclude that the 2013 BCI bills have been shaped with due regard to ILO obligations, and can see nothing in such obligations that should delay or preclude the passage of these bills.

26. Clearly there is a long history of dialogue between Canberra and Geneva that has to be undertaken to properly gauge the compatibility of our labour laws with ILO obligations and this can take a period of years. The 2013 BCI bills are set to be no different.

(e) IMPACT ON INDUSTRY PARTICIPANTS

27. This term of reference asks the Committee to have regard to "*the potential impact of the bills on employees, employers, employer bodies, trade and labour councils, unions and union members;*".

28. AMMA approaches this from a number of starting assumptions.

    a. Parliament passes laws to be followed, not disregarded. When parliament becomes aware that laws it maintains remain justified are not being followed, enforcement must be strengthened (or the law reformed to be more enforceable).

    b. It is inherently in the interests of all participants in any area of policy/regulation that the rule of law apply, and that the laws parliament sets are observed.

    c. Rules of the game, which are observed and enforced, are critical to ensuring mutually beneficial outcomes. Perhaps one group could temporarily get more

from the law of the jungle, but if you have regard to the interests of employees and employers and employer bodies and trade and labour councils and unions and union members, observing the rule of law is critical as an equity measure, in the interest of all industry participants.

d. Regulation and its enforcement does have an impact. Those being regulated may not be able to do all they could do previously. Not only is this fundamental to regulation generally, but it's particularly important in labour market regulation which is always depriving one interest of an existing capacity or practice in the interests of balance or harmony, or some other policy goal.

A strong productive industry is good for everybody

29. The interests of employees, employers, employer bodies, trades and labour councils, unions and union members and a myriad of others are best served by a strong productive, job-generating, investment attracting construction industry.

30. The best thing parliament can do for industry participants across the board is help the industry grow, prosper, secure investment, and create jobs.

Unions can operate under the ABCC:

31. The ABCC did not shut down trade unionism in the construction industry, nor did it ever seek to. Unions were able to remain in business, representing their members and securing beneficial industrial outcomes.

32. The CFMEU, AMWU, CEPU etc. will all remain in place as organisations after the commencement of this legislation and the ABCC recommencing, with their existing elected representation and paid officials. These officials will enjoy unaltered the rights and protections they are entitled to exercise under the Fair Work Act and other legislation (such as OHS legislation). Australia will remain one of the very best places on earth to be a trade unionist seeking to represent one's members.

33. Unions will be able to represent their members in negotiating agreements, including through the talking of lawful (and indeed legally protected) industrial action.

34. The ABCC and the restored legislation will come into play only when something untoward occurs, and when any of the actors identified in this term of reference attempts to act unlawfully.

35. It is trite to observe, but nonetheless true, that those who do no wrong will have nothing to fear from the legislation or the regulator.

a. If an organisation, company, individual etc. complies with the law, it will not incur additional penalties or be subject to prosecution.

b. Equally, any organisation and its officers that deliberately transgress the law in its activities will be impacted upon, and those impacts will be negative (that's the fundamental nature of law and regulation).

c. Furthermore, an organisation or individual who learns and modifies behaviour to operate within the law will not again encounter the ABCC.

Trades and Labour Councils

36. The inclusion of trades and labour councils on this list appears odd. These are generally not registered organisations, and are often historically concentrated on state union branches. They are also multi union bodies, of which construction unions make up only a subset of funding and representation.

37. It is up to any participating TLCs to tell the Committee how they may be affected, but at this stage it is difficult to see (a) how the legislation impacts on the TLCs, and (b) how any impacts on them are relevant to the passage of the legislation.

The Committee needs to look further

38. With respect, the Committee has also focussed its attentions too narrowly on those directly involved in the industry in this term of reference:

a. The wider Australian community and economy are affected by the costs of our built environment and infrastructure. The wider Australian community has an interest in cost effective, reliable construction in this country and form an interest group in this debate which must rank alongside existing industry participants.

b. The costs and reliability of construction affects job creating investment, potentially impacting on opportunities for tens of thousands of Australians that are neither building industry employers, employees, unions etc.

c. We have also for more than 100 years pursued public policy in this country that assumes industrial relations in any industry, particularly an industry this critical, are not solely the preserve of the persons and organisations directly concerned. Australia has always treated industrial disputation and observance of the rule of law in key industries as concerns for the community as a whole, and this wider perspective should be maintained in regard to this Bill.

(f) POWERS TO OBTAIN INFORMATION

39. AMMA does not endorse the initial pejorative wording of term of reference (f), nor do we engage in debate about the inaccuracy of the presumptions contained therein.

40. Chapter 7 of the *Building and Construction Industry (Improving Productivity) Bill 2013* addresses the ABCC's proposed powers to obtain information.

41. As with so much of the 2013 BCI bills, the proposed provisions should be understood as follows:

a. The various powers in Chapter 7 are known concepts, were powers of the previous ABCC, and were contained in the previous BCII Act 2005.

b. If the Committee wishes to know how this will operate in practice, it should look to experience with the operation of the previous provisions.

c. These approaches are not mere whim and fancy, they were specifically recommended by a Royal Commission as essential remedial measures to address proven cultures of lawlessness, intimidation, coercion etc.

d. Terrance Cole QC was an eminent and experienced jurist. He knew exactly the strength of the investigatory powers he was recommending, and he recommended precisely the measures now being reintroduced because he considered them essential and proportionate to the wrongs being remedied.

42. Furthermore, the Committee should recall the following:

a. The compulsory nature of many of the information gathering provisions was considered essential to overcome the cultures of silence in the industry, and instances of witnesses or those intimidated, coerced etc., being further pressured to not cooperate with those seeking to enforce the law.

b. Understood properly, the compulsory nature of some of these provisions is actually protective, and seeks to protect those providing information used to prosecute third parties from intimidation by those third parties.

c. This operates just as much against businesses and their representatives, as it does against employees and their representatives. It is very often going to be businesses that fear retribution or harming longer term relationships that would be reticent to cooperate with investigators unless specifically required to.

43. Finally, and again in a recurring theme in properly understanding the legislation, we urge the Committee to consider these powers in their proper context. Similar powers of investigation are available to those investigating corporations in their commercial conduct, such as ASIC. Thus, similar powers are used against business people to further investigations and prosecutions.

44. In this regard, these are known information gathering methods being applied to a serious set of circumstances in which there is a proven basis to conclude that information and cooperation will on occasion not be forthcoming, and that additional measures are required.

(g) RIGHT TO SILENCE

45. Presumably this is a request to address proposed Clause 62(b)(iv) of the *Building and Construction Industry (Improving Productivity) Bill 2013*.

46. We recall our input on the preceding term of reference, stressing in particular that the Royal Commissioner knew exactly what he was doing in determining that such

an approach was warranted to address unique concerns in this industry and to counteract the unique culture of lawlessness, violence and intimidation he encountered. These are specific remedial measures recorded by a Royal Commissioner to address an atypical set of circumstances.

47. The Committee also needs to be mindful that an extra safety net has been built in, which will provide even more protection than the preceding era of the ABCC (prior to 2012).

48. Under Part 2 of Chapter 7, the Commonwealth Ombudsman will oversee the examination notice process, including the exercise of Clause 62(b)(iv) of the *Building and Construction Industry (Improving Productivity) Bill 2013*.

(h) CONSPIRACY

This is simply re-applying the previous legislation

49. Clause 92 of the would introduce a number of ancillary contraventions of the civil remedy provisions set out in Division 2 of Part 2, as follows:

> **92 Ancillary contravention of civil remedy provisions**
>
> (1) A person must not:
>
> (a) attempt to contravene a civil remedy provision; or
>
> (b) aid, abet, counsel or procure a contravention of a civil remedy provision; or
>
> (c) induce (by threats, promises or otherwise) a contravention of a civil remedy provision; or
>
> (d) be in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of a civil remedy provision; or
>
> (e) conspire with others to effect a contravention of a civil remedy provision.
>
> *Civil penalty*
>
> (2) A person who contravenes subsection (1) in relation to a civil remedy provision is taken to have contravened the provision.

50. Section 48(2) of the former *Building and Construction Industry Improvement Act 2005*, contained the following:

> **SECT 48 - Definitions**
>
> (2) For the purposes of this Part, a person who is involved in a contravention of a civil penalty provision is treated as having contravened that provision. For this purpose, a

person is involved in a contravention of a civil penalty provision if, and only if, the person:

(a) has aided, abetted, counselled or procured the contravention; or

(b) has induced the contravention, whether by threats or promises or otherwise; or

(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or

(d) has conspired with others to effect the contravention.

51. Thus, it would be erroneous for the Committee to treat the new bills as creating something new or novel in regard to conspiracy, rather the bills would simply restore the preceding approach.

52. In considering the likely impact and effect of the provisions, the Committee can have regard to the application of the equivalent provisions prior to the watering down of the ABCC in 2012.

This is existing, accepted concept in law

53. AMMA does not purport to offer a detailed discourse on the law of conspiracy.

54. However, comparable prohibitions on conspiracies to take unlawful actions appear in a number of pieces of legislation, including those regulating the conduct of business and employment in Australia.

55. The key case in point, and the provision which may have directly informed the provisions of the BCI bill under examination, is s.79 of the *Corporations Act 2001*:

SECT 79 - Involvement in contraventions

A person is involved in a contravention if, and only if, the person:

(a) has aided, abetted, counselled or procured the contravention; or

(b) has induced, whether by threats or promises or otherwise, the contravention; or

(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention; or

(d) has conspired with others to effect the contravention.

56. The Committee also need look no further than the *Fair Work Act 2009* itself, for an existing provision in near identical terms:

SECT 550 - Involvement in contravention treated in same way as actual contravention

(1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.

> (2) A person is involved in a contravention of a civil remedy provision if, and only if, the person:
>
> (a) has aided, abetted, counselled or procured the contravention; or
>
> (b) has induced the contravention, whether by threats or promises or otherwise; or
>
> (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
>
> (d) has conspired with others to effect the contravention.

57. See also s.256 of the *Model Work Health and Safety Bill*, which is again in directly comparable terms.

58. The Fair Work Act context would appear a directly comparable application of the prohibition on conspiracy (to work, collective industrial relations etc.) to that proposed in the BCI Bill 2013.

59. See also: *The Migration Act 1958, s.*486ZD, and numerous other statutes from across the common law world, particularly those regulating the conduct of corporations and their officers.

60. The implications of all this are straightforward. The proposed legislation is:

    a. Simply (re) applying a widely applied legal concept/construct to be able to take action against aiding, abetting, conspiring etc. to break the law.

    b. Doing no more in regard to prohibiting conspiracies to contravene the law by employees and their organisations than is done to prohibit unlawful conspiracy by Australian business or employers.

61. It should also be noted that the conspiracy provisions of the *Building and Construction Industry (Improving Productivity) Bill 2013* will apply not only to employees and trade unions, but also to all other industry participants, including employers and their advisers. However, these are legal constructs that businesses, advisers and representatives are experienced in operating under, and successfully avoid activating by not entering into conspiracies.

62. Therefore, this term of reference also rests on something of a false assumption. No provision of these bills "*introduces the law of conspiracy into the industrial regulation of the building and construction industry*", as both the Fair Work Act 2009 and OHS legislation (at least) have long applied this concept to industry participants.

(i) OCCUPATIONAL HEALTH AND SAFETY

63. The OHS provisions of the BCI Bills are contained in Chapter 4, and relate to the ongoing work of the Federal Safety Commissioner (FSC) and the WHS accreditation scheme for Commonwealth Building Work.

64. In essence, the bills appear set to maintain the FSC and continue its work.

65. OHS remains subject to a complex web of federal and state obligations, including in relation to construction. There are also added obligations in regard to mine and offshore LNG safety regulated by the Commonwealth and the States and Territories.

66. AMMA does not understand the OHS provisions of the current BCI bills, nor the preceding 2005 legislation to have ever been, or to have ever attempted to be, an exclusive or exhaustive code regarding OHS in the industry.

67. The FSC is not a stand-alone safety regulator in the construction industry, just as the ABCC does not displace the role of the FWC in agreement approval, ballots, award making etc.

68. The 2005 BCII Act, and the proposals in the 2013 BCI bills, create a dedicated additional OHS regulator to add to the already existing web of regulation governing the industry (which is in a process of strengthening and greater effectiveness through harmonisation).

69. Thus, whilst it has never been the job of the FSC to be solely responsible for "*the protect(ion) of the health and safety of employees and contractors in the industry*" the FSC is playing an important ancillary role as recommended by the Cole Royal Commission, to compliment Safe Work Australia and state and territory OHS regulators.

70. The FSC explains its role thus:

> The Cole Royal Commission into the Building and Construction Industry concluded that it examined no more important subject than occupational health and safety (OHS), and found that the safety record for the industry was unacceptable. It recommended that the Australian Government use its influence as a client and provider of capital to foster improved OHS performance.
>
> The Australian Government agreed to implement the majority of the Royal Commission's OHS recommendations, including establishing the Federal Safety Commissioner (FSC) to develop, implement and administer an OHS accreditation scheme for Australian Government building and construction work.

> In June 2004 the Hon Kevin Andrews MP, then Minister for Employment and Workplace Relations, announced that the FSC would be administratively established within the then Department of Employment and Workplace Relations. The FSC and the Scheme are provided for under the Fair Work Building Industry Act 2012 (the Act).
>
> Building Code
>
> The Act provides for the Minister to issue one or more documents that together constitute the Building Code. The Building Code 2013 was issued on 25 January 2013 and came into effect on 1 February 2013.
>
> The Building Code 2013 gives effect to the principles expressed in the 1997 National Code of Practice for the Construction Industry, which Commonwealth, State and Territory governments agreed should underpin the development of the construction industry in Australia.

71. AMMA supports it continuing to play this role, and working with industry participants to do so. We note that the FSC transitioned to the post-ABCC environment in 2012 with little difficulty or contest, and strongly urge similar consistency and continuity this time.

72. Resource industry employers would have thought the OHS provisions of the 2013 BCI bills would have been amongst those most easily and consistently supported by all parties. Thus, whilst addressing the most significant of considerations, OHS in the industry offers absolutely no basis to delay or obfuscate the passage of the 2013 BCI bills.

73. The Committee should also be very cautious regarding any attempt to have the fate of the ABCC legislation (the 2013 BCI bills) hinge on at large debates regarding safety in the industry.

74. There are long standing and strongly held divergent views on key safety policy considerations for the industry between representatives of employers and employees, which boil down to the adequacy and appropriateness of existing regulation to protect safety and health. Some proudly maintain that regulation can never and should never be treated as adequate, and that it is at all times in need of remediation and bolstering.

75. Such debates in construction are ever present, and some would argue this is a necessary and positive state of affairs. What debate on construction safety cannot do is be allowed to hold up essential reforms not primarily focussing on safety regulation.

76. The ABCC is not at large safety legislation, and its passage cannot become subject to an at large debate on OHS in the industry, including considerations the ABCC legislation has at no stage been tasked with addressing.

(j) OTHER

77. AMMA maintains that the Committee/Senate had sufficient basis to pass the amendments prior to convening this further inquiry.

78. The Committee should certainly be in a position to pass the bills after consideration of these further matters.

79. On this basis, AMMA does not wish to raise any further matters.

80. Once again, regardless of the specifics of conclusions arising from these terms of reference, the Senate/Parliament has the basis to commence the new sitting year by passing the *Building and Construction Industry (Improving Productivity) Bill 2013* and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013*, and should in the view of the Australian resource industry, move urgently to do so.

ATTACHMENT A: PREVIOUS SUBMISSION (Nov 2013)

Senate Standing Committee on Education and Employment

Building and Construction Industry (Improving Productivity) Bill 2013

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

Submission by the Australian Mines & Metals Association (AMMA)

November 2013

AMMA is Australia's national resource industry employer group, a unified voice driving effective workforce outcomes. Having actively served resource employers for 95 years, AMMA's membership covers employers in every allied sector of this diverse and rapidly evolving industry.

Our members include companies directly and indirectly employing more than half a million working Australians in mining, hydrocarbons, maritime, exploration, energy, transport, construction, smelting and refining, as well as suppliers to these industries.

AMMA works with its strong network of likeminded companies and resource industry experts to achieve significant workforce outcomes for the entire resource industry.

First published in 2013 by

AMMA, Australian Mines and Metals Association

GPO Box 2933

Brisbane, QLD, 4001

Contact: Scott Barklamb - Executive Director, Industry

Email: policy@amma.org.au

Phone: 07 3210 0313

Website: www.amma.org.au

ABN: 32 004 078 237

Contents

EXECUTIVE SUMMARY

- AMMA contends now, as it did in earlier submissions in 2009[2] and 2012[3] on proposed building industry laws, that the overall effect of the current laws regulating workplace relations in the building and construction industry has been to water down the inspectorate's capacity to ensure that industry participants conduct their activities in accordance with the law.
- There remains a culture of unlawfulness in the industry which requires the restoration of the Australian Building & Construction Commission (ABCC) with its full former powers, along with necessary improvements and modifications.
- As AMMA pointed out in its January 2012 submission[4], law abiding union officials, employers and workers have nothing to fear from strong laws that protect against intimidation, coercion and thuggery on building and construction sites.
- AMMA welcomes the new federal government's introduction of the Building & Construction Industry (Improving Productivity) Bill 2013, a bill aimed at re-establishing the ABCC.
- The bill would replace the existing Fair Work (Building Industry) Act 2012 and some parts of the Fair Work Act 2009 as they currently apply to building and construction industry participants.
- AMMA welcomes in particular the bill's reinstatement of former legislative provisions that provide:
  - Higher penalties for unlawful conduct by building industry participants;
  - Stronger prosecutorial powers for the inspectorate and its director;
  - A broader definition of building work;
  - More scope for injunctions to stop unlawful industrial action;
  - Stronger anti-coercion provisions;
  - More effective compulsory information gathering powers; and
  - Increased independence of the inspectorate.
- AMMA also welcomes new provisions in the bill that provide for:

[2] AMMA submission to the Senate, Education, Employment & Workplace Relations Committee on the Building & Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009, July 2009

[3] AMMA submission to the Senate, Education, Employment & Workplace Relations Committee on the Building & Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011, January 2012

[4] Ibid

- Strict rules around unlawful picketing;
- Bolstered rules around industrial action that will hold unions more accountable for their members' conduct; and
- An appropriate reverse onus of proof applied to some coercive and unlawful activities.

- While the vast bulk of the BCII Act's provisions have been restored in this bill, one notable exception is the definition of industrial action, which has not been returned to the broader BCII Act definition. Instead, the bill retains the Fair Work Act's definition of industrial action, which is narrower in scope.
- This risks some conduct by unions and union officials not being captured in the proposed legislation as it was by the BCII Act. AMMA would like to see a return to the former definition adopted in this bill.
- Having said that, AMMA welcomes a reverse onus of proof being applied to those taking industrial action for alleged safety reasons, with the bill requiring individuals to prove their safety concerns are genuine in order for such action not to be deemed unlawful.
- AMMA also notes that the bill aims to hold union officials vicariously liable for unlawful conduct engaged in by their members and other parties on their behalf, something AMMA also welcomes.
- This submission notes the importance of the construction code and guidelines, and will provide feedback on any revised draft code and guidelines as appropriate in due course.
- Finally, AMMA addresses the proposed extended geographical application of the bill to diverse activities offshore (Chapter 5 – Offshore Application).

How the committee should proceed

- AMMA and its members have consistently argued for the reinstatement of the ABCC as a matter of urgency.
- The Committee in this inquiry, is dealing with a "known quantity" in the ABCC and in the formulation of this bill. The bill restores the vast bulk of the ABCC's former functions and powers, with some notable exceptions and necessary improvements.
- Parliament in this case is merely being asked to put back in place a previous, well proven regulator under nearly identical statutory arrangements. In that sense the Committee's work should be quite straightforward.
- Notwithstanding that, AMMA has engaged with the provisions of the bill throughout this submission, highlighting the significance of key provisions of the bill.
- The Committee is to report on the bill on 2 December 2013. This gives the Parliament the opportunity to pass the bill this year, and it should pass it prior to rising for 2013.

INTRODUCTION

81. AMMA has been a consistent proponent and supporter of the Australian Building & Construction Commission (ABCC) since it was first recommended by the Cole Royal Commission in 2003.

82. Resource industry employers strongly opposed the deliberate neutering of the industry watchdog under the previous federal government and have consistently called for its reinstatement with full former powers, penalties and responsibilities. As AMMA has consistently maintained, a tough cop needs to walk the beat of the Australian building and construction Industry.

83. This is something even the former government recognised when it promised to retain a 'tough cop on the beat' that would focus on 'persistent or pervasive unlawful behaviour'[5], and it is something accepted by both the Cole Royal Commission and the later Wilcox Review.

84. One of AMMA's key policy expectations of any Australian government in the wake of the Royal Commission is that it will properly and fully implement the Commission's recommendations and, in particular, retain enforcement arrangements of the quality, consistency, rigour and merit demonstrated by the former ABCC.

85. In short, AMMA expects that any government will deliver the ABCC with the full powers and responsibilities that saw it perform so effectively between its commencement on 1 October 2005 and its eventual replacement with the deliberately neutered Fair Work Building & Construction on 1 June 2012.

Guiding principles and priorities for employers

86. The basis for the ABCC being part of the workplace relations mechanisms of government lies not only in the expectations of the community regarding lawfulness and sound dealings between building industry participants, but also in the wider economic and social interests of Australia.

87. As a mature, high labour cost country, Australia needs to be able to deliver the built environment (and our productive infrastructure) on time and on budget in order to attract investment and economic activity into this country.

88. AMMA and its members are concerned that the currently increased risk of unlawful activity, coupled with the watered down provisions of the existing legislation, code and guidelines, is putting national interest construction and resource projects at risk.

89. To ensure this does not continue to happen, the federal government must:

[5] Kevin Rudd MP, Labor Leader, and Julia Gillard MP, Shadow Minister for Employment and WR, *Forward with Fairness, Labor's plan for fairer and more productive Australian workplaces*, Australian Labor Party, April 2007

a. Recognise the history of militant unionism and lawlessness that exists in the building and construction industry to this day (and thereby have proper regard to the findings of the Cole Royal Commission);

b. Acknowledge the threat of excessive wages blow-outs, project delays and illegal strike activity to the industry;

c. Recognise that the industry requires a stable industrial environment in order to attract investment and create sustainable jobs;

d. Facilitate an industrial environment that holds unions accountable for their conduct, and their members' conduct in relation to industrial action and other unlawful activities;

e. Introduce greater protections for employers from coercion in agreement making; and

f. Provide adequate policing powers and funding to the regulator, supported by access to injunctions as necessary and sufficient penalties for unlawful industrial action.

90. Unfortunately, under the current system, unions and individuals already perceive they are less accountable for their actions and act accordingly. Some of those regulated by this specialist area, have seized the opportunities the ill-advised and short sighted watering down of the law have provided for unacceptable behaviour.

91. This is demonstrated in recent conduct such as that at Grocon's Myer Emporium construction site from 22 August 2012 to 6 September 2012 and on the McNab Avenue construction site in Footscray on 17 August, 28 August and 5 September 2012.

a. Less than three months after the neutering of the legislation and regulator, as clearly foreseen by all but then government and construction unions, the inevitable chickens came home to roost and we saw a reversion to the very conduct which gave rise to the Royal Commission, that were found by the Royal Commission and which were successfully addressed by the ABCC.

92. The FWBC launched civil proceedings in the Federal Court against the CFMEU and 10 of its officials, alleging coercion over their demands that Grocon employ union-nominated shop stewards at its sites[6]. This followed a blockade at the Melbourne CBD Emporium site. The FWBC alleged the union and its officials forcefully and repeatedly resisted attempts by Victorian Police to gain access to the Myer Emporium site and created an environment that was threatening and intimidating, posing significant safety risks to employees and subcontractors wanting to work on the site.

93. The Victorian Supreme Court later found the union had breached an injunction restraining it from interfering with concrete supplies to Grocon's Melbourne projects.

[6] Workplace Express, FWBC launches Grocon coercion prosecution against CFMEU, published 9 October 2012

94. Boral Resources (Vic) Pty Ltd also commenced legal action against the CFMEU for contempt for breaching Supreme Court orders. The company alleged it was a victim of a secondary boycott campaign by the CFMEU because it supplied concrete to Grocon's projects, the union's alleged real target.

95. In response to union conduct on those projects, AMMA welcomes the bill's new powers to stop unlawful picketing of building sites. The bill will allow the building industry regulator to seek a court injunction to end pickets like the one organised by the CFMEU at Grocon's Myer Emporium site. The bill also introduces a new civil penalty for picketing.

96. The Fair Work Act's anti-coercion provisions, which have covered building industry participants since 1 June 2012, are inadequate to deal with conduct such as that displayed on the Grocon sites and AMMA welcomes the return to the BCII Act's broader anti-coercion provisions in this bill.

The transition from the ABCC to FWBC

97. The former BCII Act operated in conjunction with the federal WR legislation of the day very effectively. Until 30 June 2009, the federal WR legislation was the Workplace Relations Act 1996 which, as AMMA has previously pointed out, 'provided the necessary grounding in the building and construction industry for agreement making, union right of entry, pattern bargaining, freedom of association, secret ballots and prohibited content'[7].

98. Much of the WR legislation, now the Fair Work Act 2009, has changed since the inception of the ABCC in 2005, and is expected to remain largely in its current form for the foreseeable future, with some exceptions outlined in the *Coalition's Policy to improve the Fair Work laws*. Key changes will most notably be in the areas of union right of entry and greenfield agreement making.

99. While many of the provisions of the Workplace Relations Act 1996 were important in supporting the work of the ABCC, the success of the regulator ultimately rested on the key provisions of the former BCII Act, which provided for:

    a. Higher penalties for unlawful conduct than existed under the general WR legislation;

    b. Stronger prosecutorial powers;

    c. A broader definition of industrial action;

    d. Greater scope for injunctions to stop unlawful action;

    e. Stronger anti-coercion provisions;

    f. More effective compulsory information gathering powers; and

[7] AMMA, *Building industry regulator: A tough cop or a transition to a toothless tiger*, 2008, AMMA

g. High levels of independence from the minister of the day.

100. The BCII Act was complemented by the National Code of Practice for the Building & Construction Industry and its Implementation Guidelines, designed to lift standards in the industry.

101. Together, that suite of tools formed a strong and effective regulatory framework that compelled compliance with the rule of law, and those tools were administered by the ABCC, which was the genuine tough cop the industry needed.

102. Despite its success, following a long-running union 'hate' campaign the ABCC was abolished on 31 May 2012 and replaced with the current industry regulator, Fair Work Building & Construction (FWBC) on 1 June 2012.

103. As part of the transition to the new regulator, the WR legislation specific to the building and construction industry, the BCII Act, was repealed and replaced with the Fair Work (Building Industry) Act 2012. In the move to the new legislative regime, many areas previously regulated by the BCII Act reverted to regulation by the Fair Work Act instead, while the remaining narrower provisions of the Fair Work (Building Industry) Act were weakened.

104. It is a matter of record that neutering and disempowering a regulator successfully doing work recommended by a Royal Commission led to a return to / spread of the wrongs that Royal Commission was tasked to address.

105. It remains AMMA's view that the Fair Work Act does not provide adequate protection against unlawful and inappropriate conduct by building industry participants yet that is what currently governs important aspects of building industry compliance such as:

a. the definition of industrial action;

b. penalties for unlawful conduct;

c. injunctions against unlawful industrial action; and

d. anti-coercion provisions.

106. Both the Cole Royal Commission Report and the Wilcox Report agree that a dedicated, additional level of regulation (and an additional regulator) is required for this industry, above and beyond the prevailing fair work framework.

107. They continue to give the current federal government the proper basis on which to restore the entire powers of the former ABCC and AMMA is pleased to see this bill, which proposes to do exactly that, was tabled in the first days of the new parliament, acting on the new government's clear mandate for change.

1. THE RESOURCE AND CONSTRUCTION INDUSTRIES

Onshore construction

108. The building and construction industry is of vital importance to the resource industry and the economy at large. As the Bureau of Resources and Energy Economics (BREE) points out, it is not just commodity prices but the costs of construction including labour costs, as well as productivity that play a key role in determining how much of the investment pipeline will be realised in our resources industry.

109. It is important to remember that in 1996, the mining industry employed just 56,529 people. Today, it directly employs 270,100 people[8], representing a quadrupling of direct employment in 17 years.

110. In 2011-12, the export of mineral and energy commodities was valued at $187.1 billion, representing around 60% of Australia's total exports[9]. Over 1.1 million people are engaged in producing that wealth, 270,100 of them directly employed at mining industry operations (the Reserve Bank of Australia recently estimated the resource industry employs up to three times as many people indirectly as it does directly[10]).

111. The investment pipeline for minerals and energy projects typically starts at the exploration stage then moves to the publicly announced stage. Some projects then move onto the feasibility stage then to the committed stage and finally the completed stage, after which the "construction" phase ends and production of the commodity begins in the "operational" phase.

112. BREE estimates that in April 2013 there was between $621 billion and $671 billion in resource projects in the investment pipeline. Around $121 billion to $171 billion was for uncommitted resource projects that had been publicly announced; another $232 billion was for projects at the feasibility stage; and another $268 billion was for projects at the committed stage. This means there is currently $353 billion to $403 billion in capital expenditure riding on resource projects that have yet to be committed.

113. Mega projects worth more than $5 billion have been the main driver of these record high levels of capital investment including:

    a. The $12 billion Scarborough Gas project, which would create 2,400 jobs in the construction phase and 125 jobs in the operational phase;

    b. The $12 billion Dudgeon Point project in Queensland, which would create 5,000 jobs in the construction phase and 800 in the operational phase when it comes online in 2016;

[8] 6291.0.55.003, *Labour Force, Australia, Detailed Quarterly, August 2013*, published 19 September 2013
[9] BREE, *Resources and Energy Quarterly*, June Quarter 2013
[10] Reserve Bank of Australia research discussion paper, *Industry dimensions of the resources boom*, February 2013

c. The $10 billion Alpha Coal Project (Tad's Corner) in Queensland, which would create 4,000 in the construction phase and 1,800 jobs in the operational phase when it starts up in 2015; and

d. The $9.5 billion Roy Hill Iron Ore Mine & Infrastructure in the Pilbara in WA, which would create 3,600 jobs in the construction phase and 2,000 jobs in the operational phase from 2015.

114. Some of the mining construction projects currently either under consideration or under construction include the:

a. Gorgon LNG project, with a capital expenditure of $52 billion, creating 10,000 jobs in its construction phase and 3,500 in the operational phase;

b. Ichthys Gasfield (including Darwin LNG plant), involving a capital expenditure of $33 billion, which will create 4,000 jobs in the construction phase and 700 in the operational phase; and

c. Wheatstone LNG Project, involving capital expenditure of $29 billion, which will create 5,000 jobs in the construction phase and 400 in the operational phase.

115. There are, however, significant challenges in realising the significant investment opportunities that are currently available. Current projects in the investment pipeline are by no means guaranteed and the experience of the past decade is that not all projects will progress to the committed stage.

116. Greater certainty in the construction of new productive infrastructure would be one important factor in supporting grater investment into Australia's resource industry.

117. Below are examples of some feasibility stage projects that were delayed or cancelled in the 12 months leading up to April 2013.

Delayed or cancelled projects in the 12 months to April 2013

Project	Company	Value
Browse LNG	Woodside	$36 billion
Outer Harbour	BHP Billiton	$30 billion
Olympic Dam Expansion	BHP Billiton	$20 billion
Sunrise LNG	Woodside	$12 billion
Abbot Point T4-9	NQBP and partners	$11 billion
West Pilbara Iron Ore	Aquila Resources	$7.4 billion
Wandoan Coal Mine	Xstrata	$6 billion
Kooragang Island Coal Terminal 4	PWCS	$5 billion
Anketell Point Port	Fortescue / Aquila	$4 billion
Cape Lambert Magnetite Project	MCC Mining	$3.7 billion
Southdown Magnetite Project	Grange Resources	$2.9 billion
Yarwun Coal Terminal	Metro Coal	$2.2 billion
Mount Pleasant Coal Mine	Rio Tinto	$2 billion
Weld Range Iron Ore Project	Sinosteel Midwest	$2 billion
Balaclava Island Coal Terminal	Xstrata	$1.5 billion
Fisherman's Landing LNG	LNG Limited	$1.1 billion
Surat Basin Rail	Aurizon / Xstrata	$1 billion
Wilkie Creek Coal Mine	Peabody Energy	$1 billion
Total		**$149 billion**

Source: Resources and Energy Major Projects – April 2013, published by BREE

118. In the current economic climate, it is vitally important that investor confidence is strengthened, and part of that confidence will come from the state of the WR environment, and the cost, reliability and timeliness of the construction phase of resource projects.

119. The WR environment in the building and construction industry will continue to impact on investment decisions around major projects unless this bill is passed. Key decision makers within AMMA member companies as part of the due diligence process will consider what the likely WR environment will be for their project and, in the absence of strong laws and an adequate enforcement body, it is likely that concerns about the industrial environment will grow and continue to impact negatively on investment decisions.

120. Conversely restoring the ABCC will resonate with potential investors into Australian resource projects, and be a factor favouring job creating investment in this country (and these projects yield jobs in their productive phase lasting decades).

Offshore construction

121. AMMA represents employers throughout the offshore construction sector, as well as the principals of major projects and other offshore employers for whom offshore construction and associated work is undertaken.

122. Around $170 billion of Australia's resource industry value lies in offshore hydrocarbons projects. These projects are highly exposed to any unlawful union activities in the supply chain and on construction sites.

123. AMMA notes that the bill proposes to extend the geographical application of this legislation to diverse activities on offshore hydrocarbons projects. AMMA's response appears at Chapter 5 – Offshore Application.

2. THE COLE ROYAL COMMISSION

Introduction

124. On 29 August 2001, the Government appointed the Honourable Terrance Cole QC to conduct a Royal Commission into the Australian building and construction industry.

125. A key finding of the Royal Commission was that a culture of lawlessness existed in the Australian building and construction industry.

126. Instances of inappropriate behaviour cited/found by the Cole Royal Commission included:

    a. industrial action against employers with non-union agreements;

    b. work stoppages due to refusals to enter into union agreements;

    c. unions' failure to consult with and give regard to the views of employees;

    d. union circulation of 'approved contractor lists'; and

    e. disregard of the provisions of industrial agreements[11].

127. In his final report released on 24 February 2003, Cole recommended the establishment of a special regulatory authority, to be called the Australian Building & Construction Commission. The Building & Construction Industry Improvement Act 2005 created the ABCC, which commenced operating on 1 October 2005, thereby implementing key recommendations of the Royal Commission.

The Wilcox Review

128. Royal Commissions occupy a unique status in our legal system, and their remedial recommendations cannot (generally speaking) be displaced by a mere administrative inquiry not conducted with the same legal status as a Royal Commission. Putting this point to one side….

129. The former federal government commissioned the Hon Murray Wilcox QC to consult and report on matters related to the creation of a specialist division with the inspectorate of Fair Work Australia with responsibility for the building and construction industry. This followed earlier promises made by then-Opposition Leader Kevin Rudd to the labour movement that his government, in office, would abolish the ABCC.

    a. The extraordinary nature of this second review was noteworthy, as was the then government's intention to no longer give effect to the specific remedial recommendations of a Royal Commission – something this bill will correct.

[11] The Hon Murray Wilcox QC, Report, *Transition to Fair Work Australia for the building and construction industry*, March 2009, Australian Government

130. On 3 April 2009, Minister for Employment & WR, Julia Gillard, released Wilcox's final report, *Transition to Fair Work Australia for the Building and Construction Industry*.

131. The Wilcox report found:

a. The ABCC had made a significant contribution to improved conduct and harmony in the building and construction industry[12];

b. There was still such a level of industrial unlawfulness in the building and construction industry, especially in Victoria and Western Australia, that it would be inadvisable not to empower the inspectorate to undertake compulsory interviews;

c. Any tough new regulator in the building and construction industry would need a power of coercive interrogation, at least under present conditions[13]; and

d. Repeated contraventions of the law, even if only industrial law as distinct from criminal law, may cause considerable disruption to building projects. If projects were sufficiently large or urgent, or the conduct replicated elsewhere, the breaches could take on national significance[14].

132. Wilcox accepted that '*…there can be no doubt that the Royal Commissioner was correct in pointing to a culture of lawlessness by some union officers and employees, and supineness by some employers, during the years immediately preceding his report …*"[15]

133. However, rather than make recommendations that would retain a tough cop on the beat, Wilcox made recommendations that led to the inspectorate being undermined by bureaucratic, administrative processes and weak laws.

134. Recommendations of greatest concern included:

a. The requirement that access to compulsory information gathering powers would need approval by a presidential member of the Administrative Appeals Tribunal who would be responsible for issuing notices to attend interviews (AMMA welcomes the removal of these requirements in the current bill);

b. A sunset provision that would automatically repeal the compulsory information gathering powers after five years. This was changed to three years when the current legislation was enacted on 1 June 2012 on the basis that it had taken several years for the bill to successfully pass through parliament

[12] The Hon Murray Wilcox QC, Report, *Transition to Fair Work Australia for the building and construction industry*, March 2009, Australian Government
[13] The Hon Murray Wilcox QC, Report, *Transition to Fair Work Australia for the building and construction industry*, March 2009, Australian Government
[14] The Hon Murray Wilcox QC, Report, *Transition to Fair Work Australia for the building and construction industry*, March 2009, Australian Government
[15] The Hon Murray Wilcox QC, Report, *Transition to Fair Work Australia for the building and construction industry*, March 2009, Australian Government

(AMMA notes the sunset provision is absent from the current bill and very strongly supports that approach); and

c. The creation of an Advisory Group with responsibility for determining the policies, programs and priorities of the inspectorate (AMMA also welcomes the current bill's repeal of those provisions).

135. The Cole Royal Commission and the Wilcox report both found evidence of a culture characterised by widespread disregard for the rule of law.

136. It is now widely accepted that the industrial culture of the building and construction industry is unique and presents such problems for the rule of our industrial laws that dedicated regulation and specialist enforcement are required.

137. However, we have a situation in which the specialist legislation and regulator have been disempowered and fall well short of what is required.

3. WHY THE ABCC MUST BE RESTORED

138. It is to be hoped that while a tough industry regulator is a necessity in the current environment, at some future time the culture and behaviour of industry participants will return to that of mainstream expectations and the rule of law will not just be observed but ingrained into the culture of the industry.

139. At some future point in time, there may no longer be the need for a specialist industry regulator, but that time is not now…. not by a long stretch.

140. As developments in the industry and the recent focus and emphasis of FWBC have demonstrated, the ABCC remains a desperately needed regulator to address widespread unlawful industrial conduct in the industry.

141. This committee need look no further than the shameful actions in relation to the Myer Emporium in Melbourne in August 2012 to see how fundamentally flawed and unacceptable the industrial relations culture in the industry remains and how desperately overdue the reinstatement of the ABCC has become.

142. On that basis, AMMA welcomed the then-Opposition's formal announcement in May 2013 that it would, if elected, move to urgently restore the ABCC with its full former powers. The Coalition's *Policy to improve the Fair Work laws* states that:

> *The Coalition will re-establish the Australian Building and Construction Commission (ABCC) to ensure it maintains the rule of law and drives productivity on commercial building sites and construction projects whether on-shore or off-shore.*
>
> *Until it was abolished by Labor, the ABCC had been very effective in addressing workplace militancy and improving productivity in the building and construction industry. It helped increase industry productivity by around 10 per cent, reduced days lost to strikes, and provided an annual economic welfare gain of over $6 billion per year.*
>
> *The ABCC will replace Labor's failed Fair Work Building Construction unit and will administer a national code and guidelines that will govern industrial relations arrangements for Government projects. This step will ensure that taxpayers' dollars are used efficiently. We will work with state governments who have put in place their own codes, to ensure consistency.*

143. AMMA is pleased to see the new government giving effect to its commitment by tabling this bill in the first week of the new parliament, following consultation with industry and other stakeholders. It is hoped that once this bill is enacted, we will see a swift return to the types of economic and productivity benefits achieved under the ABCC in its previous incarnation.

Productivity improvements due to the ABCC

144. Hard evidence of the ABCC's economic and other benefits to the building and construction industry was cited in the Wilcox report in 2009[16].

[16] The Hon Murray Wilcox QC, Report, *Transition to Fair Work Australia for the building and construction industry*, March 2009, Australian Government

145. Wilcox acknowledged as 'persuasive' the information provided locally in terms of productivity improvements on specific construction projects. Wilcox said evidence from two companies in particular helped to 'throw some light' on productivity improvements that had occurred at the project level since the introduction of the previous building industry reforms.

146. The first case study was from Melbourne-based construction company Grocon Pty Ltd. Grocon told the Wilcox inquiry it had seen increased productivity since the introduction of the ABCC's predecessor, the Building Industry Taskforce, from 2002 in the form of fewer industrial disputes.

147. Grocon gave evidence that on one building site where work was performed between 1999 and 2002 (before the ABCC or its predecessor were introduced), there were 206 working days lost from a total of 1,156 working days during the life of the project. Of the 206 days lost, 120 were due to inclement weather but 86 were attributable to industrial disputes (equating to 7% of total working days on the project).

148. On a second Grocon construction project running from 2005 to 2007 (after the ABCC and BCII Act had been introduced), there were 22 working days lost from a total of 565 days lost on the project. However, just one of those days was due to industrial disputes (equating to 0.002% of total working days on the project).

149. Grocon told the Wilcox inquiry:

> *"Many inefficient practices existed before the establishment of the ABCC as we believe it has not only helped to eliminate those practices and improve productivity and efficiency, but also to an increase in benefits in terms of improved OHS standards … We believe the ABCC has been instrumental in bringing about compliance to lawful conduct in the building and construction industry."*

150. The second case study cited in the Wilcox report was from Woodside Energy which highlighted the differences between two resource projects (LNG Train 4 and Train 5), one following the introduction of the ABCC and the BCII Act and one preceding it. The two projects were compared for their industrial relations records, with both having a similar capital cost, a similar-sized workforce during peak periods, and similar 'man' hours worked.

151. On the LNG Train 4 project, which began before the ABCC and BCII Act were introduced:

    a. The number of 'man' hours lost due to industrial action was 254,000 (compared with 27,000 on the later LNG Train 5 project);

    b. The number of disputes resulting in industrial action was 26 (compared with nine on the later project);

    c. The number of stoppages of two days or more was 17 (compared with three on the later project); and

d. The number of matters subject to federal industrial tribunal applications was 10 (compared with four on the later project).

152. Woodside told the Wilcox inquiry while part of the improved industrial performance could be attributed to 'proactive management of workplace relations', the most significant contributor was the threat of the compliance powers under the BCII Act and the activities of the ABCC.

153. A 2009 report by KPMG Econtech, *Economic analysis of building and construction industry productivity* commissioned by Master Builders Australia concluded that not only the legislative reforms themselves but the regulator's effective monitoring and enforcement of them were important in driving productivity increases in the industry that would not otherwise have been achieved.

154. The KMPG Econtech report cited practical benefits for employers associated with the operation of the ABCC and BCII Act as including:

a. Significantly reduced days lost to industrial action;

b. Less misuse of safety issues for industrial purposes;

c. Proper management of inclement weather procedures;

d. Improved rostering arrangements; and

e. Cost savings stemming from the prohibition on pattern bargaining.

155. Those achievements were said to be due to:

a. The BCII Act which established various prohibitions;

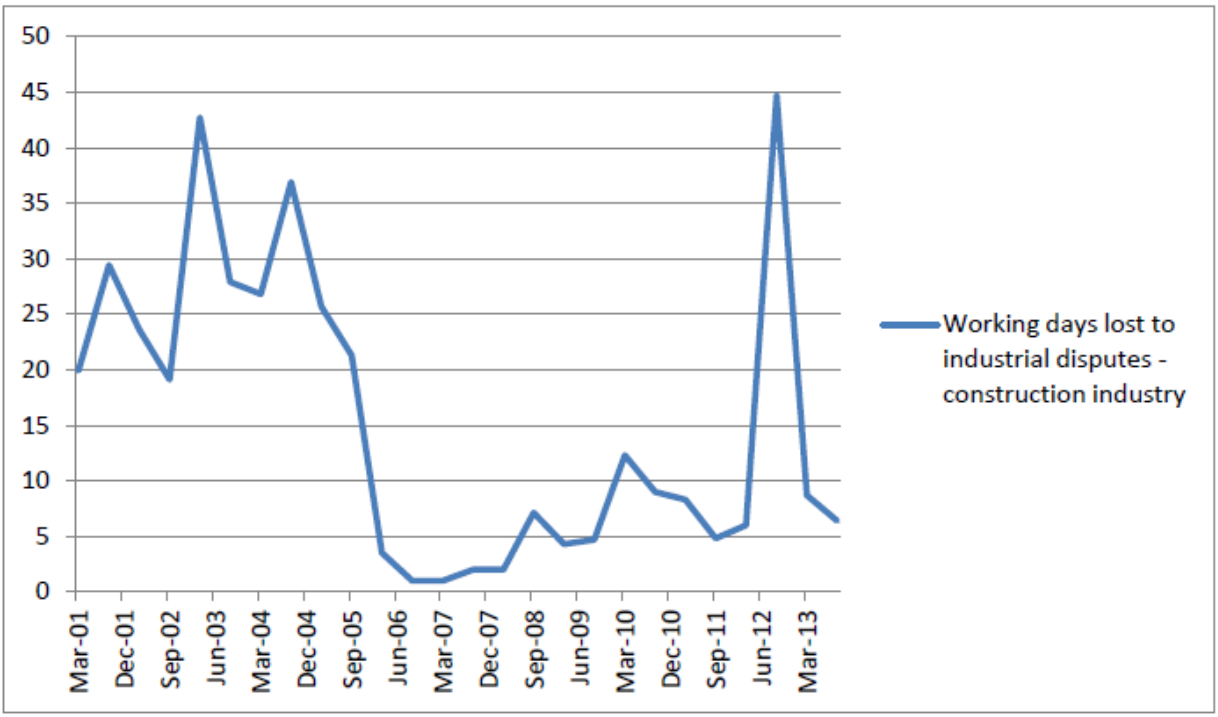
b. The ABCC's extensive powers of investigation and prosecution; and

c. The National Code of Practice for the Construction Industry, which provided a powerful commercial incentive to comply with the principles of freedom of association.

156. The graph below shows the number of working days lost to industrial disputes in the construction industry every second quarter between March 2001 and March 2013.

157. What we are seeing is a high number of working days lost to industrial disputes leading up to the introduction of the ABCC and BCII Act on 1 October 2005, after which we see an immediate and dramatic drop. Working days lost to industrial disputes then remained at relatively low levels until a small increase coinciding with the change to a Labor government in December 2007 and again with the introduction of the Fair Work Act on 1 July 2009. We then see a dramatic spike that coincides almost exactly with the repeal of the BCII Act and ABCC on 1 June 2012.

Working days lost to industrial disputes in the construction industry



AMMA members' experiences

158. Feedback from AMMA members is that the ABCC has supported their efforts in the building and construction industry by:

a. Enforcing the former BCII Act and investigating any breaches to create a level playing field;

b. Restoring law and order to construction sites;

c. Employing officials with legal backgrounds who were responsive, understood the issues and were able to achieve good results thanks to the strength of the legislation backing them;

d. Improving industrial relations practices on projects, including by reducing the incidence of unlawful industrial action;

e. Providing a set of obligations with which all building industry participants had to comply;

f. Ensuring a more orderly and controlled industry and, equally importantly, restoring the perception to overseas investors of a reliable and lawfully operating workforce;

g. Increasing the accountability of building industry participants for their actions, including by bringing increased media attention to transgressions;

h. Helping to resolve entrenched WR issues that were not being addressed or not able to be addressed by building industry participants themselves;

i. Introducing a strong and powerful 'policeman' required to meet its statutory obligations without fear or favour; and

j. Ensuring fairer outcomes to disputes.

159. AMMA members also reported the following economic benefits from the work of the ABCC during its time:

a. Curbing the unreasonable site activities of militant unions;

b. Reducing the number of costly unlawful strikes;

c. Bringing disputes to a speedier resolution thereby reducing the economic impact of stoppages;

d. Ensuring an even playing field within the market in which construction and resource companies operate;

e. Providing an inspectorate that gives companies more teeth when dealing with unreasonable and unproductive union demands; and

f. Improving labour productivity.

160. Any productivity improvements experienced in the construction industry have direct flow-on effects to the mining industry in terms of cost savings and reduced prices, just as any negative cultural changes can have a flow-on effect.

161. In Report 6 of the AMMA Workplace Relations Research Project by RMIT University's Dr Steven Kates (August 2013), 20% of respondents to a survey reported a significant deterioration in the culture of the building and construction industry since the 1 June 2012 changes took effect that abolished the proven watchdog.

162. Full results for that particular question are reproduced below.

	% of respondents
Yes – there has been a significant deterioration in industry culture	20.0
Yes – there has been a slight deterioration in industry culture	10.0
No – there has been no noticeable difference in industry culture	70.0
Yes – there has been a slight improvement in industry culture	0.0
Yes – there has been a significant improvement in industry culture	0.0

163. As one respondent to that survey said:

"On the back of weaker regulation, the promotion of futile militancy by some union parties as a means of achieving outcomes has disillusioned some workers who just want to come to work, do a good job and get home safely."

The need for cultural change

164. As former ABC Commissioner John Lloyd remarked often during his time as head of the industry regulator, even during the ABCC's operation the culture of the building and construction industry had not yet undergone a meaningful or permanent change, although unlawful behaviour had been curbed.

165. What we saw then was a regulator only part way into stewarding a process of essential industry transformation deliberately have its powers and capacities reduced – and of course, inevitably, any nascent cultural change went into reverse.

166. As AMMA noted in a 2008 report[17], a history of disregard of federal industrial tribunal and court orders combined with a 'culture of silence' undermined earlier attempts to effectively carry out investigations and enforce the law, thus encouraging industrial uncertainty in the building and construction industry.

167. The ABCC and the BCII Act were created to address such lawless behaviour and enforce the rule of law to achieve long-term sustainable cultural change in the industry. Wilcox himself acknowledged this in his original discussion paper[18].

168. The current means for achieving the stated object of the existing legislation in s3 of the Fair Work (Building Industry) Act 2012, which is to "provide a balance framework for co-operative, productive and harmonious workplace relations in the building industry" are not sufficiently strong in their expression to address the problems identified by the Cole Royal Commission and the Wilcox Report.

169. Of notable absence in the objects of the current Act is the reference to an effective means of investigation and enforcement, which was contained in s3 of the BCII Act and which AMMA is pleased to see has been reinstated in this bill.

170. Respect for the rule of law, respect for the rights of building industry participants and ensuring accountability for unlawful conduct by providing an effective means for investigation as well as enforcement are key drivers of cultural change in the industry and should remain explicit objects of the Act.

171. Thus, the case for this legislation does not rely on proving that dedicated approaches to regulation and enforcement are required in this industry; that has already been unambiguously accepted by virtually everyone bar the construction industry unions.

172. This legislation is required because the current specialised approach for this industry has not proved effective, is not meeting the expectations of the community, and is failing to give effect to the specific recommendations of a Royal Commission.

[17] AMMA, *Building Industry Regulator, a tough cop or a transition to a toothless tiger?* 2008, AMMA, 16
[18] The Hon Murray Wilcox, Proposed building and construction division of Fair Work Australia discussion paper, Australian Government

4. SPECIFIC PROVISIONS OF THE BILL

173. The Building & Construction Industry (Improving Productivity) Bill 2013:

a. Gives effect to the pre-election announcements of the Government and its unambiguously communicated commitment to restore the ABCC if elected; and

b. Applies the vast bulk of previous terms of the BCII Act, thereby bringing back the ABCC with a near identical statutory foundation and powers to those applying prior to its abolition, with some necessary improvements.

174. The bill does contain some specific departures from the previous BCII Act including:

a. As set out in the government's pre-election announcements, the bill retains Commonwealth Ombudsman oversight of the exercise of the compulsory information gathering powers although removes the onerous requirement to gain approval from the Administrative Appeals Tribunal before issuing a notice to attend;

b. The bill retains and reproduces the Fair Work Act's definition of industrial action, which is narrower than the pre-existing definition under the BCII Act (to which AMMA would in fact like the bill to return); and

c. Increasing maximum penalty amounts to reflect changes in the cost of each penalty unit which is now $170 per unit rather than $110, although it retains the same maximum number of penalty units for breaches, being 1,000 for a body corporate and 200 for an individual.

175. The bill also:

a. Introduces new provisions covering unlawful picketing;

b. Includes bolstered rules around the taking of industrial action that aim to hold unions more accountable for their actions; and

c. Applies a reverse onus of proof to those accused of some types of coercive behaviour and unlawful activities.

176. Employers' support for the bill is reinforced by the simplicity of its approach. The bill does what the Government said it would do, as set out in the pre-election policy.

177. To put it in the vernacular – the bill does what it says on the box and essentially brings back the ABCC based on reapplying the 2005 BCII Act and applying other specific modifications as set out in the pre-election policy.

178. AMMA makes submissions on the specific provisions of the bill below.

Scope and definitions

Objects of the Act

179. The current mechanisms for achieving the object of the Fair Work (Building Industry) Act 2012 have lost sight of the big picture. The history and culture of workplace relations in the building and construction industry identified by the Cole Royal Commission, is such that effective separate regulation, and a separate regulator, is required.

180. The following table compares the two previous pieces of building industry specific legislation with the current bill in terms of their objects and how they will be achieved. As can be seen, the current bill proposes to return to the same object as the BCII Act and the same means for achieving it.

Before 1 June 2012 Building & construction Industry Improvement Act 2005	**From 1 June 2012 Fair Work (Building Industry) Act 2012**	**Proposed in November 2013 Building & Construction Industry (Improving Productivity) Bill 2013**
The main object of this Act is to provide an improved workplace relations framework for building work to ensure that building work is carried out fairly, efficiently and productively for the benefit of all building industry participants and for the benefit of the Australian economy as a whole. This Act aims to achieve its main object by the following means:	The object of this Act is to provide a balanced framework for co-operative, productive and harmonious workplace relations in the building industry by:	The main object of this Act is to provide an improved workplace relations framework for building work to ensure that building work is carried out fairly, efficiently and productively for the benefit of all building industry participants and for the benefit of the Australian economy as a whole. This Act aims to achieve its main object by the following means:
Improving the bargaining framework so as to further encourage genuine bargaining at the workplace level		Improving the bargaining framework so as to further encourage genuine bargaining at the workplace level
Promoting respect for the rule of law	Ensuring compliance with workplace relations laws by all industry participants	Promoting respect for the rule of law
Ensuring respect for the rights of building industry participants		Ensuring respect for the rights of building industry participants
Ensuring that building industry participants are accountable for their unlawful conduct		Ensuring that building industry participants are accountable for their unlawful conduct
Providing effective means for investigation and enforcement of relevant laws	Providing an effective means of enforcing those rights and obligations Providing appropriate safeguards on the use of enforcement and investigative powers	Providing effective means for investigating and enforcing this Act, designated building laws (to the extent that those laws relate to building work) and the Building Code
Improving occupational health and safety in building work	Improving the level of occupational health and safety in the building industry	Improving work health and safety in building work
Encouraging the pursuit of high levels of employment in the building industry		Encouraging the pursuit of high levels of employment in the building industry

Before 1 June 2012 Building & construction Industry Improvement Act 2005	From 1 June 2012 Fair Work (Building Industry) Act 2012	Proposed in November 2013 Building & Construction Industry (Improving Productivity) Bill 2013
Providing assistance and advice to building industry participants in connection with their rights and obligations under relevant industrial laws	Providing information, advice and assistance to all building industry participants about their rights and obligations	Providing assistance and advice to building industry participants in connection with their rights and obligations under this Act, designated building laws and the Building Code

181. "Respect for the rule of law", "ensuring that building industry participants are accountable for their unlawful conduct" and "providing an effective means for investigation and enforcement of the law" included in the BCII Act and this bill's objects strike at the very heart of the problems identified by the Cole Royal Commission that continue to plague the building and construction industry today.

182. AMMA therefore supports the bill's restored means for achieving the objects of the proposed bill which will encourage:

a. respect for the rule of law and for the rights of building industry participants;

b. accountability for unlawful behaviour; and

c. an effective means for both investigation and enforcement of relevant laws.

Definition of building work

183. Section 6 of the bill sets the scope of the restored ABCC by defining 'building work'.

184. Aside from the offshore application of the bill (Chapter 5 of this submission), s6 of the bill returns to the BCII Act's definition (s5 of the BCII Act).

185. In particular, the bill restores the BCII Act's inclusion of pre-fabrication work whether carried out onsite or offsite in the definition of 'building work'. The current legislation includes only onsite prefabrication work in its definition of 'building work' at s5.

186. The bill also adds a new area of coverage into the definition of building work – transporting or supplying goods to be used in construction work covered under the definition of building work transporting directly to building sites, including any resources platform.

Industrial action and unlawful conduct

Definition of industrial action

187. With the transition to the new industry regulator on 1 June 2012, the definition of 'industrial action' by building industry participants ceased to be covered by building industry-specific laws and reverted to the Fair Work Act's definition under s19.

188. Section 36 of the BCII Act previously cast a wider net whereas the Fair Work Act restricts the meaning of industrial action to conduct by employees and employers only and does not extend the definition to union conduct as the BCII Act did.

189. However, AMMA notes the new vicarious liability provisions included in the bill which aim to hold unions accountable for employees' conduct. Those provisions appear at s94 of the bill.

190. The current legislation narrowed the definition of industrial action compared with the BCII Act, thereby reducing the policeman's beat and overlooking action taken solely by unions.

191. AMMA is somewhat disappointed that s7 of this bill for the most part simply reproduces the definition of industrial action included in s19 of the Fair Work Act.

192. However, AMMA notes that one difference between s7 of this bill and s19 of the Fair Work Act is that the bill would impose an explicit burden of proof on workers purporting to use alleged safety concerns as a reason to stop work (ie to take 'protected' industrial action). That provision is a new provision that was not included in the BCII Act or the Fair Work Act.

193. The current application of the Fair Work Act in the area of industrial action is inadequate and based on erroneous assumptions by the Hon Murray Wilcox QC in his final report.

    a. He stated that almost all workplaces covered by the Fair Work Act would have an enterprise agreement in place, which would automatically render any industrial action taken outside of the bargaining process unlawful.

    b. He further said he considered it unnecessary and of no practical difference to retain the broader definition of industrial action that was contained in s36 of the BCII Act.

194. As AMMA previously pointed out[19], Wilcox's assumption is incorrect given that:

    a. Large mining expansion and construction projects will extend beyond the nominal operating life of an agreement, which the Fair Work Act reduced to a maximum of four years. Building unions also continue to seek agreements with nominal three-year terms; and

    b. Some employers rely on the award and / or common law contracts without having to enter into formal statutory agreements.

195. The reinstatement of the full unlawful industrial action provisions contained in the BCII Act is necessary to cover union conduct that is not adequately covered by s19 of the Fair Work Act.

196. This broader definition is necessary and of practical significance to efforts to address persistent and pervasive unlawful behaviour in the industry.

Injunctions to stop unlawful action

[19] AMMA submission to the Senate Education, Employment & Workplace Relations Committee inquiry into the Building & Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011, January 2012

197. In the transition to the current "neutered" system, former provisions in the BCII Act that allowed injunctions to be granted in response to unlawful industrial action ceased to be regulated separately for building industry participants. This important area instead reverted to the relevant provisions of the Fair Work Act.

198. Section 39 of the BCII Act allowed an appropriate court to grant an injunction where it was satisfied that unlawful industrial action (as more broadly defined under the BCII Act) was 'occurring' or 'threatened, impending or probable'.

199. That general power to grant an injunction was wider than s417(3) of Fair Work Act, which now applies. The Fair Work Act is limited to instances where industrial action (as more narrowly defined) is being 'organised or engaged in', not that which is 'threatened, impending or probable', thus reducing the scope for injunctions to be granted against unlawful industrial action before it occurs.

200. AMMA welcomes s48 of the current bill allowing injunctions to be granted if a court believes unlawful industrial action is 'occurring' as well as being 'threatened, impending or probable' or 'being organised', thus restoring the full suite of provisions to curtail this type of unlawful behaviour.

Unlawful picketing

201. The bill at s47(1) introduces a new prohibition on unlawful picketing by "a person", including persons that are not members or employees of industrial organisations (ie who are not trade union members, delegates or officials). The bill applies a reverse onus of proof to those alleged to be engaging in unlawful pickets.

202. Section 47(2) defines an unlawful picket as one that has the purpose of preventing or restricting access to a building site or ancillary site or would reasonably be expected to intimidate a person from accessing the site; and which is motivated by supporting or advancing claims against a building industry participant in respect of the employment of employees or contractors or for the purpose of advancing industrial objectives, or which is otherwise unlawful.

203. This provision would have the effect of addressing so-called "community pickets" being used covertly, tacitly or with the implicit support of construction industry unions to place industrial / commercial pressure on businesses that would otherwise be prohibited by our employment laws.

204. Resource industry employers strongly support action to restrict these so-called "community pickets" being used to allow unions (by proxy) to place industrial pressure on employers that would not be available to unions themselves under the principal laws parliament has set to regulate workplaces.

205. This bill, once passed, would hopefully allow the building industry regulator to seek court injunctions to end pickets like the one organised by the CFMEU at Grocon's Myer Emporium site.

206. Another example of such, whilst not specific to the building industry, is the recent picketing of cruise ship the Spirit of Tasmania in furtherance of an industrial relations

claim which caused considerable harm to businesses and the wider Tasmanian community.

207. In the Spirit of Tasmania case, the businesses and community being impacted had nothing to do with the dispute. The protest action, which was ultimately about an employment matter, sought to progress an industrial claim of a registered industrial organisation.

208. Resource industry employers view this area as follows:

a. If Parliament or our courts choose to make particular picketing action illegal or actionable, the picketing or action should be illegal or actionable regardless of who is ultimately organised to stand the picket line.

b. The community should not accept fellow travellers and deliberately cultivated circles of supporters outside the control and responsibility of an organisation being tasked with advancing the priorities of that organisation that would otherwise not be legal.

c. Organisations, in this case building unions, should not be able to use contrived arrangements to "work around" restrictions imposed upon them by the law. In particular, union officials should not be able to have other persons pursue union agendas on the basis that those persons are not subject to the disciplines and responsibilities imposed upon delegates, staff and officers of registered organisations.

Social media

209. The importance of the proposed prohibition on unlawful picketing is heightened in the age of social media, with unions and their supporters having new tools to rapidly disrupt business operations through the organisation of non-union members.

210. It should not be acceptable for mobs of "concerned persons" to mysteriously materialise, agitating identical concerns to those of an industrial organisation but concerns which the officers and members of that organisation are not legally permitted to pursue through picket action.

211. The community should not be asked to accept trade unions using "Twitter riots" or "Faceboook flashmobs" to have sympathetic non-union members march to their tune and impose operational pressures on businesses that would not otherwise be legally available to the trade union.

Links to organised crime

212. Upon the current bill being tabled in federal parliament, the CFMEU fired the first public shot linking building industry industrial relations to organised crime as follows:

> *Support for such extreme laws is couched in terms of the industry being unlawful. The ABCC cheer squads mutter darkly of union connections with organised crime and bikie gangs, citing sensationalist media coverage. What they never do is explain how industrial laws could cure criminality, even were criminality found to be endemic in the industry (a contention that doesn't stand up to scrutiny in any event).*[20]

213. What the Parliament can know is that if these provisions of the bill are not passed, and so-called community picketing continues to be encouraged, there will be increasing incentives for unions to "explore and innovate" in which parts of the wider community that it chooses to engage with in organising community protests.

214. It is not difficult to imagine that, if unions were to organise a picket line that they genuinely did not want crossed, they might call on persons of such threatening stature, reputation and community perception that their exhortations not to cross the picket line would carry significant weight.

Bullying

215. The new anti-bullying provisions of the Fair Work Act will commence on 1 January 2014.

216. In addition to significant concerns about the haste with which those provisions were legislated, resource industry employers have been at the forefront of arguing that all workplace bullying should be subject to appropriate sanctions, including that engaged in by union officials, members and their supporters. This type of bullying conduct might be used against, for example, employees who choose not to join or associate with a trade union or, of relevance to this current bill, persons choosing to cross a picket line.

217. If this parliament is going to get serious about tackling workplace bullying, its laws should not countenance anyone being abused as a "scab" or a "dog" for exercising their lawful rights. That is a clear case of bullying and intimidation.

218. AMMA and its members are looking forward to trade union bullying being more clearly drawn into federal anti-bullying laws. However, unlawful picketing in support of but not directly manned by trade unions raises the spectre of persons being unacceptably abused for discharging their lawful rights to work, or of access and egress.

[20] Dave Noonan, CFMEU , The Australian, 12 November 2013, p.12 (http://www.theaustralian.com.au/national-affairs/opinion/discrimination-not-acceptable/story-e6frgd0x-1226757669315#)

219. Section 47(2)(iii) of the current bill is a measure to address intimidation and restrictions on the exercise of lawful rights and as such is supported for inclusion in the proposed legislation.

What about rights to protest?

220. Community expectations on rights to protest may be raised with or by the Committee in consideration of this bill.

221. AMMA maintains that any such concerns can be disposed of by giving proper consideration to the bill's s47(2)(b), which narrows the subset of community picketing which is subject to this act considerably, tying it to industrial motives.

222. AMMA can see nothing in the bill which would interfere with entirely non-industrial protest actions such as:

a. Purely environmental or political protests;

b. Green bans or objections to demolition (driven by the community); or

c. Attempts to halt the construction of infrastructure for a genuinely community-driven, non-industrial purpose.

Payments for industrial action

223. Payments during periods of industrial action were again recently enlivened as an issue for the resource industry following the High Court's July 2013 decision in Mammoet[21].

224. That decision considered whether employer-provided accommodation for fly-in-fly-out (FIFO) employees undertaking industrial action constituted strike pay which was prohibited under the *Fair Work Act 2009* (and whether employers were therefore obliged to withdraw such accommodation when industrial action commenced).

225. The High Court held that the provision of such accommodation was not a "payment" that could or must be withheld under the *Fair Work Act 2009*, also giving consideration to the adverse action provisions of the Act.

226. Nothing in s49 of this bill covering payments related to periods of industrial action, or any other sections of this bill to which s49 is linked, appears in any way to contradict the High Court's findings. Nor does the application of the decision appear to be in any way affected by proposed the bill's s49 given that both the High Court and the relevant section of the bill defer to the Fair Work Act in interpreting issues around payments during periods of industrial action.

[21] Construction Forestry Mining & Energy Union v Mammoet Australia Pty Ltd [2013] HCA 36

Anti-coercion provisions

227. In the move to the current neutered compliance regime, anti-coercion provisions applying to building and construction industry participants are now drawn from the Fair Work Act rather than building industry-specific legislation.

228. The Fair Work Act provisions, which currently apply to building industry participants, are significantly narrower and more limited than those that existed under the previous BCII Act.

    a. The Fair Work Act's anti-coercion provisions at s343 are limited to cases where a person threatens or organises to take action against another person with the "intent to coerce" them not to exercise a workplace right as defined by s341 of the Fair Work Act.

229. Section 344 of the Fair Work Act, which now covers "undue influence" or "undue pressure" being applied to building industry participants to make, not make, agree to or terminate an industrial agreement only prohibits coercion by employers towards employees. This has left some coercive behaviour by other parties such as unions to fall outside the scope of this regulation, and this is not acceptable or sound policy.

230. The Fair Work Act's provisions simply do not go far enough in addressing the ongoing problems of coercion by building industry unions to achieve desired industrial outcomes, notable examples of which include:

    a. A stoppage of work with the intent to coerce a builder to employ a person as an employee or engage as a building contractor (*Williams v CFMEU and Mates (No 2)* [2009] FCA 548 (28 May 2009));

    b. A union organiser making threats with intent to coerce a subcontractor and workers to be members of a union (*Alfred v CFMEU & Ors* [2009] FMCA 613 (10 July 2009));

    c. Unlawful industrial action; coercion in relation to the engagement of workers; crane prevented from entering site (*Cahill v CFMEU & Mates* [2006] FCA 196 (10 March 2006)).

231. AMMA is pleased that the current bill returns to the bolstered anti-coercion provisions previously contained in the BCII Act and that this important area will no longer be regulated by the weaker and narrower provisions of the Fair Work Act.

232. Section 52 of the current bill (the counterpart to s43 of the BCII Act) prohibits a person from taking, threatening or organising to take action against another person with the intent to coerce that person "or a third party" to employ or not employ someone; to engage or not engage an independent contractor; or to allocate or not allocate specific duties and responsibilities. A specialised, "reverse" onus of proof applies here which did not exist under the BCII Act.

233. Section 53 of the bill (the counterpart to s46 of the BCII Act) prohibits a person from taking, threatening or organising to take action with the intent to coerce a building employee to nominate a particular super fund or scheme, or to coerce an employer

to pay contributions to a particular super fund or scheme. A reverse onus of proof applies here which did not exist under the BCII Act.

234. Section 54(1) of the bill (the counterpart to s44 of the BCII Act), prohibits a person from taking, organising or threatening to take action with the intent to coerce a person to make, terminate or vary an enterprise agreement. A reverse onus of proof applies here which did not exist under the BCII Act.

235. Section 54(2) prohibits an employer from coercing an employee in relation to who is going to be a bargaining representative for a proposed enterprise agreement, while s54(4) prohibits an employer from applying undue pressure in relation to who is to be a bargaining representative.

236. Section 55 (the counterpart to s45 of the BCII Act) prohibits a person from taking, organising or threatening to take action against a building industry employer because their employees are covered by or proposed to be covered by a particular industrial instrument. A reverse onus of proof applies here that did not apply under the BCII Act.

Maximum penalties

237. The BCII Act's previous maximum penalties for unlawful conduct by building industry participants were repealed in the move to the current system, reverting instead to the much lower penalties for unlawful conduct contained in s539(3) of the Fair Work Act.

238. Maximum penalties per breach were consequently reduced by two-thirds as of 1 June 2012, from $22,000 to $6,600 per breach for individuals and from $110,000 to $33,000 per breach for corporations including unions.

239. The deterrent value of such penalties has therefore been massively reduced. As one respondent to a recent AMMA survey said:

> *"Individuals breaching these provisions are more inclined to do so because the penalties have been watered down. There have been some instances of brazen breaches of workplace law which may not be found so because of the diluted strength of the law."*[22]

240. The fact is the previously higher penalties in the BCII Act more appropriately reflected the considerable financial consequences of unlawful conduct by building industry participants. Those financial consequences are magnified by the fact that building and construction industry projects invariably involve multi-million or billion-dollar investments. A failure to meet contractual requirements can incur significant liquidated damages.

241. The Cole Royal Commission characterised the building and construction industry as unique, with an acknowledgement that the behaviour occurring in the industry, and the extent of that behaviour, was not reflected in any other industry.

[22] Report 6 of the AMMA Workplace Relations Research Project, written by RMIT University's Dr Steven Kates in August 2013

242. Both the former government and the Wilcox inquiry accepted there was still a level of unlawfulness in the industry, and that specialised / dedicated approaches were needed.

243. In AMMA's submission to the Wilcox review, we drew attention to the following observations made in court proceedings:

a. "*There is a long and well-documented history of unlawful activity by union organisers and delegates in the building industry in Australia that counsel for the CFMEU acknowledged, but submitted that there has been a considerable change in culture over recent years. This makes it desirable that any return to the bad old days be appropriately penalised*." Gyles J, *A&L Silvestri Pty Ltd v CFMEU* [2008] FCA 466 (11 April 2008)

b. "*The breaches, although in response to a safety issue, were deliberate. Resolution of the safety issue did not require the taking of industrial action. There was no reason why work could not continue on other parts of the site which were unaffected by the spill.*" *Cahill v CFMEU* [2008] FCA 495 (11 April 2008)

c. "*[T]he loss of two and a half days' labour by three hundred employees must necessarily have involved a substantial financial impost…the contraventions were deliberate in nature and in defiance of the law. There is no basis upon which the justification of the action on the basis of health and safety grounds can be maintained*." Burchardt FM, *Cruse v CFMEU & Anor* [2007] FMCA 1873 (14 November 2007)

244. Higher penalties are needed in the building and construction industry than under the general WR legislation because:

a. Building industry participants have shown a propensity for beaching orders of the federal industrial tribunal;

b. It is rare for a court to order the maximum penalty; and

c. Retaining the significantly lower penalties for individuals under the Fair Work Act could see unions using employees as "human shields" while encouraging wildcat action.

245. In 2006, 91 employees on the Perth to Mandurah Railway Project took unprecedented industrial action causing losses of approximately $1.6 million[23].

246. Also in 2006, 192 employees on the Roche Mining Murray Darling Basin Project engaged in unprotected industrial action rather than following agreed dispute resolution processes, causing significant financial loss.

[23] AMMA, Submission to Wilcox Review of the transition of the ABCC to specialist division of Fair Work Australia, 5 December 2008

Woodside Burrup Pty Ltd and the ABCC initiated legal proceedings against the CFMEU WA branch and its assistant secretary Joe McDonald over unprotected strike action taken by employees in December 2011 on the Pluto LNG processing plant near Karratha in the Pilbara.

247. The financial costs of unprotected industrial action on large resource construction projects include:

a. Delays to the construction program affecting the ultimate completion date;

b. The cost of having machinery and equipment laying idle;

c. The loss of workers who might resign during strike action then have to be replaced (recruitment, training induction and other costs);

d. Significant accommodation costs while no productive work is being done (around $90 a night for each employee);

e. The cost of extra security while workers are not performing normal duties;

f. Extension of time claims by contractors; and

g. The potential inability of the client to meet contracts for future commodity sales once the project is up and running.

248. It is not just the business and the economy but workers themselves who are put at risk from lawlessness in the industry.

249. AMMA is pleased to see a return in the current bill to the same level of penalty units per breach as applied under the BCII Act for Grade A and Grade B civil penalty offences. With the rise in each penalty unit from $110 at the time the BCII Act was enacted to $170 currently, maximum Grade A civil penalties will return to $170,000 for bodies corporate and $34,000 for individuals under the bill. For Grade B civil penalties, the bill will return maximum penalties to $17,000 for bodies corporate and $3,400 for individuals.

250. The imposition of a significant penalty on a person for breaching the law serves to hold that person accountable for their actions and aims to deter them and others from engaging in similar action, thereby leading to the necessary cultural change.

Powers and functions of the commissioner

Prosecutorial / intervention powers

251. AMMA's January 2012 submission to the Senate inquiry into the Building & Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2012 emphasised that forcing the tough cop off the beat would damage international confidence to progress the huge capital investment program proposed for Australian industry.

252. This is particularly the case for the subsequent removal of the regulator's power to prosecute where other parties to a matter have settled.

253. A case in point is that in 2009, the ABCC effectively launched legal proceedings against 1,300 unionists who took unlawful industrial action against contractors on the Pluto project. Without the ABCC and the capacity to prosecute, the militant individuals behind such union thuggery and disregard for fellow working Australians would never be held to account for their actions.

254. The current legislation prevents FWBC from continuing to intervene in or initiating legal proceedings where the other parties involved in the matter have settled. This applies to cases where FWBC was a joint applicant in proceedings as well as where it would have sought to prosecute of its own accord. Thus a key part of the regulator's compliance arsenal has been removed.

255. Put simply, if a business has suffered so much commercial damage that it must give in to unions' demands to settle, the building industry watchdog must still be able to continue legal proceedings or bring its own separate proceedings against a union and/or employees for the damage caused during an illegal dispute.

256. Furthermore, there must be no incentive for unions to push for settlement through additional post-dispute pressures on employers (or inducements), in situations in which the union quite rightly fears the sanctions its previous conduct exposes it to.

257. AMMA is pleased that if this bill becomes law the ABCC's full former prosecutorial powers will be retuned and it will not be hamstrung in its ability to continue with or initiate prosecutions over unlawful action.

Powers to obtain information

258. The ABCC has stated that its compliance powers were critical to the success of its court proceedings[24]. That position was supported by the Wilcox report in 2009.

259. Of considerable importance, beyond the ability to compel a person to give information, produce documents or attend to answer questions is the protection such power gives to those persons who are otherwise willing to assist the ABCC but do not want to be seen as doing so.

260. Section 52 of the BCII Act empowered the ABC Commissioner to compulsorily require a person to provide information or documents or to attend to answer questions where the commissioner had "reasonable grounds" to believe the person had information or documents or was capable of giving evidence that would be relevant to an investigation.

261. The Fair Work (Building Industry) Act from 1 June 2012, while retaining the compulsory information gathering powers, imposed a number of onerous new requirements:

[24] Australian Building & Construction Commissioner, *Report on the exercise of compliance powers by the ABCC for the period 1 October 2005 to 31 March 2008*, ABCC, Australian Government

a. The director had to apply to an Administrative Appeals Presidential Member to issue an examination notice before requiring a person to give information or attend to answer questions;

b. Only the director could make such an application; and

c. The director had to notify the Commonwealth Ombudsman when a notice was issued to ensure the appropriate oversight.

262. The Wilcox report recommended these additional 'safeguards'. However, no evidence has ever been presented that the ABCC misused its power to compel witnesses to give information, produce documents or attend to answer questions.

263. One application to the Federal Court claiming the ABCC had used its powers for an improper purpose was dismissed[25].

264. Even under a new Coalition government with a new head of the FWBC (Nigel Hadgkiss) the onerous pre-conditions currently placed on the use of compulsory information gathering powers would likely delay the investigations of the ABCC. The numerous steps required in order for the director to be granted an examination notice are highly bureaucratic and administrative.

265. The Cole Royal Commission identified an embedded culture of silence in the building industry where workers were commonly advised to refuse to speak with inspectors carrying out investigations, were told instead to contact their union and 'sit in sheds whenever an inspector was onsite'[26].

266. The Cole Royal Commission recommended the compulsory powers to overcome precisely that sort of behaviour – as part of ensuring the industry no longer operated, or thought it could operate above the law.

267. The subsequent imposition of an additional administrative, bureaucratic process represents a significant watering down of powers and has further weakened the independence of the director.

268. In April 2010, former ABC Commissioner John Lloyd said he was concerned about the removal of the compulsory powers[27], saying a significant part of the building industry was "hostile and vehemently opposes the ABCC's roles and powers. I refer to the unions, ACTU, some contractors and employees". According to Lloyd:

> *"The trade unions have not ventured even a modicum of support to the ABCC and appear to refuse to recognise that unlawful conduct such as coercion and intimidation is a serious issue in the industry."*

[25] *Washington v Hadgkiss* [2008] FCA 2008
[26] AMMA, Building industry regulator: a tough cop or a transition to a toothless tiger? 2008, AMMA, 11
[27] The experience of the ABCC, ABC Commissioner John Lloyd, speech to HR Nicholls Society conference in Melbourne, 17 April 2010

269. Wilcox's reasoning for continuing the compulsory information gathering powers under the current legislation, albeit in a weakened form, rested on the level of unlawfulness that he said continued in the industry[28]. His final report stated that "under present conditions" the power would be needed and the "reality is that, without such a power, some types of contravention would be almost impossible to prove"[29].

The independent assessor

270. The current legislation established the Office of the Independent Assessor. Under the current laws, an interested person can apply to the independent assessor for the compulsory information gathering powers to be 'switched off' on a particular project.

271. Forcing the tough cop of the beat and leaving it to convince the Administrative Appeals Tribunal to allow access to the existing legislative provisions was always going to be a step in the wrong direction.

272. Removing the inspectorate's ability to compulsorily acquire information altogether on certain projects upon application by an interested person (including a union official) was a further retrograde step and AMMA welcomes its repeal in the current bill.

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

274. AMMA maintains that the compulsory information gathering powers are a key element of the regulatory regime in the building and construction industry and have been widely acknowledged as a necessary tool for identifying unlawful conduct and holding those responsible accountable.

275. AMMA supports the bill's reinstatement of the vast bulk of the previous compulsory information gathering powers, but notes the bill retains Commonwealth Ombudsman oversight of compulsory examinations.

Ministerial directions

276. The existing capacity for the minister to give directions to the director of FWBC about the inspectorate's policies, programs and priorities and the manner in which the powers and functions of the inspectorate are exercised and performed has the potential to put at risk the independence of the director.

[28] Hon Murray Wilcox QC, Report, Transition to Fair Work Australia for the building and construction industry, March 2009, Australian Government
[29] Ibid

277. This could lead to a loss of confidence in the capability of the inspectorate to act impartially and to respond to issues across the industry as they arise, which is necessary to achieve the required cultural change.

278. An example of how ministerial directions could be misused was the 17 June 2009 attempt by the then WR Minister to direct the ABCC in how it should use its compulsory information gathering powers[30]. Interference of this type (if successful) could undermine the independence of the inspectorate and the public's confidence in it.

279. We note by way of analogy the well-established limits of what ministers can and cannot direct the police to do in regard to investigations, which protect both parties and the public. Comparable checks on ministerial power should never have been removed from the building industry regulator.

280. AMMA welcomes the proposed removal in the bill of current provisions that provide the capacity for the minister to issue directions about policies, programs and priorities in s17.

281. The bill returns the ministerial powers to what they were under the BCII Act, affording the newly re-established regulator the utmost independence from government.

Vicarious liability

282. Section 94 of the bill states that any conduct engaged in on behalf of a body corporate (ie a union) by an officer, employee or official of that union or by any other person at the direction of an officer of the union, is taken to have been engaged in by the union itself.

283. Section 95 clarifies among the actions taken to be an action of a building association (ie a union) are actions taken by a member or group of members of the association if that action is authorised by an official of the union or the union's rules. This applies unless the official or union has taken all reasonable steps to prevent the action, (which AMMA considers an unwarranted caveat at the end of that provision).

284. Under s58 of the bill, AMMA notes that if a first person (ie a union official) incites a second person (ie a member or another employer) to take action against or coerce another party, if the action taken by the second person would breach the unlawful picketing provisions at s47, the first person is taken to have breached that section as well.

285. AMMA welcomes the above provisions of the bill as ways of holding trade unions properly accountable for inciting other parties to take action on their behalf.

[30] The Hon Julia Gillard MP, Deputy Prime Minister, Second Reading Speech, Building and Construction Industry Improvement Amendments (Transition to Fair Work) Bill 2009, House of Representatives, 17 June 2009

Reverse onus of proof

286. AMMA notes that under s57 of the bill, the reason for particular actions is to be assumed unless proven otherwise.

287. This "reverse onus of proof" applies in relation to some of the bill's anti-coercion provisions as well as to the offence of unlawful picketing, and to the taking of industrial action over alleged health and safety concerns.

288. Section 97 of the bill confirms that, in relation to the enlivening of any of the bill's provisions applying to coercive behaviour or incitement, it is irrelevant whether the person being coerced is able, willing or eligible to do a particular thing they are being coerced to do. Those found to be engaging in coercive conduct will still be held liable for that coercion regardless.

Code and guidelines

289. The existing Building Code 2013 is a watered down version of the former code and guidelines that regulated behaviour on Commonwealth government-funded construction projects and ensured taxpayer investment in government projects delivered value for money.

290. The National Code of Practice for the Construction Industry and Implementation Guidelines were a requisite element of the regulatory environment in the building and construction industry while they were in force – and these mechanisms continue to have a vital role to play if properly formulated as part of serious, meaningful regulatory framework.

291. The former code and guidelines played a significant role in changing the culture of the industry. They set out the principles and standards of behaviour to be met by industry participants who tendered for government work, ensuring that WR laws were complied with. They could also act to prevent anti-competitive conduct arising through collusive tendering practices.

292. The return of a robust code and guidelines to all projects, whether public or private, is an important factor in ensuring that a new culture takes hold in the industry, and AMMA welcomes the Coalition's policy commitment to restore a robust code and guidelines and to work co-operatively with those states that have recently implemented their own code and guidelines.

293. The Building Code 2013 has weakened the regulatory regime in the industry and could well lead to lower standards of behaviour at a time when Australia needs to be more productive. This needs to be reversed and a proper code re-established as part of a genuine framework of regulation.

294. It is worth noting that the following matters would have been considered non-compliant under the previous code and guidelines but not under the Building Code 2013:

a. Posting at worksites notices such as posters, helmets, stickers or union logos or flags, etc;

b. Requiring union site delegates to undertake or administer site induction processes;

c. Requiring employers to apply union logos, mottos or other indicia to company-supplied property or equipment, including uniforms;

d. Requiring employees to be exclusively represented by a union in dispute settlement processes;

e. Attempting to avoid right of entry requirements by allowing delegates or shop stewards to perform a similar function;

f. Omitting an express limitation that any outcome determined by a third party cannot be inconsistent with the code and guidelines;

g. Including "one-in, all-in" arrangements such as relating to overtime;

h. Including "last-on, first-off" clauses in agreements; and

i. Determining redundancy solely by reference to seniority of employees.

295. AMMA would like to see a restored code and guidelines reinstate prohibitions on the full gamut of behaviours and practices that have negatively impacted on productive and harmonious relationships in the industry, and looks forward to further consulting with the government ahead of a revised code being released.

5. OFFSHORE APPLICATION

Introduction

296. There are clear imperatives for an improved workplace relations framework in respect of offshore construction.

a. The efficiency and productivity of construction for the offshore oil and gas sector is of direct benefit to building industry participants, the Australian economy and the future of Australia.

i. Around $170 billion of Australia's resource industry value lies in offshore hydrocarbons projects. These projects are highly exposed to any unlawful union activities in the supply chain / in construction.

b. All employees deserve to be able to go to work each day without the fear of being harassed, intimidated or the subject of violence.

i. In a maritime environment, the safety and well-being of workers is the paramount consideration of employers.

ii. However, the offshore construction environment is complex. The scale of engineering, for example, is immense and problems raised by the operation of vessels and the maritime environment require specialist solutions.

iii. Accordingly, construction activities undertaken are extremely specialised in nature and employers strive always to enhance work health and safety wherever possible.

c. As for onshore building and construction, standards of industrial conduct exhibited in the offshore construction sector represent a significant departure from that in the rest of the Australian economy/community expectations; see, for example, *United Group Resources Pty Ltd v Calabro* (No 7) [2012] FCA 432 and *Fair Work Ombudsman v Offshore Marine Services Pty Ltd* [2012] FCA 498.

d. The regulatory frameworks applying to offshore hydrocarbons[31] are highly complex and overlapping. Federal laws must be complied with at the same time as international legal obligations and, when relevant, State and Territory legislation.

i. Recent Federal legislative amendments, such as the *Migration Amendment (Offshore Resources Activity) Act 2013* (Cth) have added further complexity.

[31] Extending well beyond employment law / legislation.

ii. Those amendments to the *Migration Act 1958* (Cth) are yet to commence and are uncertain and imprecise in respect of their practical application to offshore resource activities.

This section of the AMMA submission

297. AMMA draws to the attention of the committee the limited time available for consideration of the extended geographical application of the bill to the many diverse activities (all key elements) of any offshore hydrocarbons project. Further, current and future projects are utilising highly innovative methods of construction, drilling and extraction of hydrocarbons offshore.

298. AMMA members have asked that this chapter of the submission addressing the offshore application of the bill draw four matters to the attention of the committee:

a. The strong support of offshore resource industry employers for the speedy enactment of the bill and the restoration of the ABCC, including its extended geographical application offshore.

b. The importance of unambiguous legislation, clear and precise in its meaning and its intended application. The clear and precise meaning of terms used is vital to the achievement of the legislative objective of the bill - fairness, efficiency and productivity for the benefit of building industry participants and the Australian economy. It is a principle of legislative drafting that terms should be sufficiently defined, particularly when they may have substantial consequences.

c. Consistent with (b), it will be important for the meaning and intended application of the legislation to be clarified in such circumstances.

d. Given the complexity and current uncertainty regarding the combined effect and application of all regulatory frameworks applying to offshore hydrocarbons projects, any practical difficulties and concerns arising from the extended geographical application of the bill may take some time to emerge.

299. In relation to the offshore application of the bill, this section of the AMMA submission addresses matters regarding proposed sections 11, 6 and 3.

Proposed s. 11 (Extension of Act to EEZ and waters above continental shelf)

300. Under proposed s.11(1), the bill will extend to:

a. Any resources platform in the EEZ or in the waters above the continental shelf.

b. Any ship in the EEZ or the waters above the continental shelf, that is travelling to or from (or both to and from) an Australian port.

301. In his second reading speech to the bill, the Minister for Education and Leader of the House stated[32]:

> *The bill extends the geographic limits to the Exclusive Economic Zone and land* [sic] *above the continental shelf. This extension will bring the legislation into line with the Fair Work Act.*

302. Section 33(1) of the *Fair Work Act 2009* (Cth) extends the operation of that Act expressly to:

a. Australian flagged ships and fixed platforms in the EEZ or over the continental shelf.

b. Any ship in the EEZ or over the continental shelf that operates to and from an Australian port and that services or operates in conjunction with a fixed platform in the EEZ or over the continental shelf.

c. Any ship in the EEZ or over the continental shelf that is operated or chartered by an Australian employer and that uses Australia as a base.

303. In addition, the Fair Work Act provides for the geographical application of that Act to be extended further (s.33(3)) or modified (s.33(4) and (5)), something which could usefully be added to regulation making powers in this bill for its offshore application.

304. Regulation 1.15E of the *Fair Work Regulations 2009* extends and/or modifies the application of that Act to ships in the EEZ and above the continental shelf.

305. Regulation 1.15E states that the Fair Work Act extends to:

a. "Licensed ships" (licensed under the *Navigation Act 2012* (Cth)).

b. "Majority Australian-crewed ships".

306. This means that rather than being in line with the Fair Work Act, the terms of the 2013 BCI bill in this respect are more general and go beyond the extended application of the Fair Work Act.

307. **Three issues** are addressed in this regard.

308. **First**, the bill uses the term "resources platform", defined in s.5 to mean, "an artificial island, installation or structure attached to the seabed for the purpose of exploration for, or exploitation of, resources or for other economic purposes".

309. The definition of "resources platform" is based on the definition of "fixed platform" in the Fair Work Act which includes the word "permanently"; that is, "... installation or structure permanently attached to the seabed ..."

[32] Parliamentary Debates, House of Representatives, Thursday, 14 November 2013, 16

310. That is, "fixed" has been replaced with "resources" and the requirement in the Fair Work Act definition of "fixed platform" for the installation or structure to be "permanently" attached has been removed.

311. The origins of the Fair Work Act definition were considered in *Fair Work Ombudsman v Pocomwell Limited (No 2)* [2013] FCA 1139 (Pocomwell) at [129]-[140]. At [112], Barker J examined whether drill rigs were "fixed platforms" and stated (at [112]):

> *In this context it is the adverb "permanently" which creates the particular issue of contention. If it did not appear in the definition of "fixed platform", there would be little doubt or at least less, on the facts, that the rig in each case was a structure "attached to the sea-bed for the purpose of exploration for, or exploitation of, resources".*

312. The definition of "resources platform" in s. 5 may be ambiguous in some respects. Two examples are provided.

a. Example 1 - While it is likely that the definition is intended to extend to FLNGs and FPSOs, it is not clear whether the definition of "resources platform", in which the word "permanently" has been removed, will extend to jack up rigs, drill ships or submersibles: see *Pocomwell* at [140] but also at [112]. In practice, however, those vessels are unlikely to be engaged in or to be the subject of building work.

b. Example 2 - It is not clear whether a pipelay vessel would be regarded as a resources platform. A number of questions would arise, including whether the pipelay vessel was an installation or a structure and whether it was relevantly attached to the seabed when laying pipe. If dynamically positioned, the only attachment would be via the pipeline while it was being laid. While the pipelay vessel would be a ship, the bill is expressed to apply to ships in the EEZ only if they are travelling to or from (or both) an Australian port.

313. **Second**, the bill would apply to any "ship" in the EEZ or above the continental shelf which is travelling to or from an Australian port.

314. Three examples are provided of possible ambiguity regarding this element of s. 11.

a. Example 1 - The bill does not define the word "ship", although s. 12 of the Fair Work Act defines ship to include, "*a barge, lighter, hulk or other vessel*".

i. In the absence of a definition in the bill, the word will have its ordinary meaning. While there are United Kingdom and Australian decisions in which the ordinary meaning of the word "ship" has been held to include a variety of offshore resource vessels including jack up rigs , MODUs, an FPSO and a backhoe dredger which was not self-propelled, the proper construction of the word "ship", in the context in which it appears in the bill, is not free from doubt.

ii. AMMA suggests it would be preferable for a definition of "ship" similar to the definition in the FW Act to be included in this legislation.

b. Example 2 - The legislation will extend to a ship "travelling to or from (or both to and from) an Australian port".

i. This means, for example, that the legislation will not extend to vessels which may be engaged in building work in the EEZ, such as for the construction of a resources platform, but which have travelled from and will return to a foreign port.

ii. Further, the requirement that a ship be "travelling to or from (or both to and from) an Australian port" may lead to difficulties of interpretation. Consider, for example, a pipelay vessel, which, having entered an Australian port to say comply with importation requirements under the Customs Act 1901 (Cth), proceeds to the worksite in the EEZ and spends the next 10 months laying pipe (without returning to an Australian port) before returning overseas. It is not "travelling" from an Australian port but has broken or terminated its journey from the Australian port to lay the pipe. See, by analogy, *BP Australia Ltd v Bissaker (Collector of Customs (WA))* (1987) 163 CLR 106.

iii. AMMA suggests that if the intention is to apply the legislation to offshore construction work, including subsea installation, the bill should state clearly and precisely that it applies to any ship engaged in such work.

c. Example 3 - The general provision in s. 11 is far wider than the more specific provision made in s. 33(1) of the Fair Work Act. The bill allows for the further extension of its geographical application (see s. 11(2)), but does not allow for its modification; that is, it does not include provisions equivalent to s. 33(4) and (5) of the Fair Work Act.

i. Currently, and subject to regulations may in accordance with s. 11(2), the application of the bill will be to any ship in the EEZ or the waters above the continental shelf travelling to or from an Australian port. Without modification in respect of "licensed ships" or "majority-Australian crewed ships" (found in Fair Work Reg 1.15E), the bill would apply to many more ships than those to which the Fair Work Act applies. This would mean the bill is not "in line with the Fair Work Act".

ii. Again, it is suggested the intention should be made clear, and all appearances are that the Bill would be improved by the inclusion of provisions reflecting s.33(4) and (5) of the Fair Work Act 2009.

315. **Third**, AMMA notes that s.120(3) of the bill, which allows for retrospective operation of regulations made within 120 days of commencement of the bill, does not include a reference to s.11(2). The explanatory memorandum does not give an explanation for the omission of s.11(2).

Proposed s. 6 (Meaning of *building work*)

316. The definition of "building work" in proposed s. 6 is drafted broadly once again, and is intended to apply to both onshore and offshore construction. The explanatory memorandum states (at 5):

> *In order to ensure appropriate coverage for the legislation the definition of building work is broad.*

317. **Three** aspects of the current wording of s. 6 are raised for the consideration. They relate to the intended effect of:

a. The extension of the onshore definition of "building work" to offshore construction (s. 6 generally).

b. The inclusion of transport or supply of goods.

c. The exclusion of drilling for, and extraction of, oil and gas.

318. **First**, in its current form, s. 6 appears complex and not sufficiently easy to understand in regard to its offshore application.

319. In particular, the meaning of "building work" in respect of offshore construction is multi-layered. Some paragraphs within s. 6 will apply. Others will not. The explanatory memorandum does not assist in clarifying the intended meaning in respect of offshore construction (see page 6).

320. See, for example, s. 6 (2), when read with the legislative note, s. 6(6) and s. 11. The intended meaning in respect of offshore construction of these combined provisions is not clear or precise.

321. Under s. 6, it may be difficult to determine whether particular work is "building work". Three examples are provided.

a. Example 1 - While it is likely that fixed platforms, FLNGs and FPSOs would be regarded as "structures" and that most subsea installations will be regarded as either a "structure" or "works", it may be difficult to determine whether the building, structure or works form part of land. In practice, it may be difficult to apply relevant legal principles. See, for example, *Anthony v Commonwealth* (1973) 47 ALJR 83 at 89, and *Eon Metals NL v Commissioner of State Taxation* (1991) 91 ATC 4841.

b. Example 2 - From the definition of building work, it is not clear whether it will apply to the installation of a pre-commissioned facility such as an FPSO. The definition relevantly refers only to, in paragraph 1(a), the "construction . . . of structures or works" and, in paragraph 1(c), "the installation in any . . . structure or works of fittings etc". The reference to installation in paragraph 1(c) will probably cover hook up and commissioning but whether paragraphs 1(a) or even 1(d) ("any operation that is part of, or is preparatory to, or is for rendering complete, work covered by paragraph (a)"), will apply to say tugs or AHVs

engaged in manoeuvring or attaching a resources platform to the seabed is open to question.

c. Example 3 - It is not clear whether all employees engaged on a ship engaged on building work, are themselves performing building work. For example, is a cook on a pipelay vessel performing building work? The definition of "industrial action" in section 7 of the bill revolves around the performance of building work. Unless an employee can be said to be performing building work, the prohibition on unlawful industrial action will not apply to that employee. While it is possible activities such as cooking and cleaning on a vessel engaged on building work fall within paragraph (d) of the definition ("any operation that is part of, or is preparatory to, or is for rendering complete, work covered by paragraph (a), (b) or (c)"), it is not clear.

322. AMMA notes that a law that is easy to understand is less likely to result in dispute.

323. A solution to clarify meaning might be a separate paragraph specifically defining "building work" in respect of offshore construction. Possible wording might be:

> *The construction, alteration, extension, restoration, repair, demolition or dismantling of resources platforms, pipelines and other subsea installations attached to the seabed (and a further definition of "attached").*

324. **Second**, s. 6(1)(e) provides that building work means, "*transporting or supplying goods, to be used in work covered by [previous paragraphs in s. 6(1)], directly to building sites (including any resources platform) where that work is being or may be performed*".

325. Again, s.6(1)(e) as drafted may make it difficult to determine whether particular offshore construction is "building work". Three examples are provided.

a. Example 1 - While the inclusion of paragraph (e) states clearly that the bill applies to the transport or supply of goods, it does leave a question mark over the bill's application to the transport of building employees and contractors (building industry participants). The express inclusion of paragraph (e) makes it less likely that paragraph (d) will be construed as applying to the transport of building industry participants.

b. Example 2 - As discussed in relation to proposed s. 11, the parliamentary intention regarding the meaning of "resources platform" appears ambiguous and lacking in clear and precise meaning. As s. 6(1)(e) provides for delivery "directly to building sites (including any resources platform)", it may not in fact be broad enough in its drafting to apply to all transport journeys for the purposes of offshore construction; for example, a delivery by one ship to a construction vessel, or a maritime support vessel delivering pipe to a pipe-lay vessel, as the pipe-lay vessel is not attached to the seabed.

326. It is important to ensure that unintended consequences will not arise from the enactment of proposed s. 6(1)(e).

327. This may take some time to determine as it will require economic and other research, together with discussion across both the offshore resources sector and the construction sector (onshore and offshore).

328. **Third**, under s. 6(1)(f) the meaning of "building work" does not include "the drilling for, or extraction of, oil or natural gas". In light of the issues raised in this final section of our submission, this provision may also not contain sufficient precision regarding offshore resource activities; for example, as drafted, the legislation may not apply to a ship supplying provisions or drill materials to a drill ship.

Proposed s. 3 (Main object of this Act) and ch.4

329. Proposed section 3(2) states that the main object of the legislation is to be achieved by a number of specified means. One of these is "*(f) improving work health and safety in building work*". Chapter 4 establishes the position of Federal Safety Commissioner.

330. In this context, AMMA notes the extensive and specialised nature of work health and safety legislation already regulating offshore activities, including:

a. For hydrocarbons, the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (the OPGGSA), and regulations.

b. For vessels, the *Occupational Health and Safety (Maritime Industry) Act 1993* (Cth), and regulations.

331. Offshore work health and safety regimes have been the subject of considerable review by recent Federal Governments. There has been significant reform to regulatory arrangements, but in each case the importance of maintaining specific regulatory frameworks for offshore work health and safety has remained a key priority.

332. AMMA looks forward to the Federal Safety Commissioner working cooperatively with the existing specialised offshore work health and safety regulators, with a view to the existing specialist regulators retaining primary if not sole responsibility for their existing spheres of operation.

a. This may take the form of memoranda of understanding or agreed practice guidelines agreeing the roles and coverage of respective organisations on and offshore.

b. Inter-organisational cooperation and avoiding regulatory overlap, redundancy or ambiguity might usefully be emphasised during the passage of the legislation, or even in the legislation.

c. As a safety net, regulations should also empower the Minister(s) to direct the agencies towards appropriate cooperation and on their appropriate spheres and methods of operation in the offshore sector.