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# Inquiry into the Building and Construction Industry (Improving Productivity) Bill 2013 [No.2] and a related bill

19 February 2016



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Chamber of Commerce  
and Industry



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## Table of Contents

<b>1</b>	<b>Introduction</b>	<b>4</b>
<b>2</b>	<b>Importance of the building and construction industry to the national economy</b>	<b>6</b>
<b>3</b>	<b>The findings of the Royal Commission into Trade Union Governance and Corruption</b>	<b>6</b>
3.1	The Interim Report	7
3.1.1	Boral case study	8
3.1.2	Other case studies	10
3.2	The Final Report	12
<b>4</b>	<b>The findings of previous royal commissions</b>	<b>14</b>
<b>5</b>	<b>The economic benefits of prior reform</b>	<b>16</b>
<b>6</b>	<b>The effect of the Building Bills</b>	<b>17</b>
<b>7</b>	<b>About the Australian Chamber</b>	<b>19</b>
7.1	Who We Are	19
7.2	What We Do	19

# 1 Introduction

On 4 February 2016, the Senate referred the *Building and Construction Industry (Improving Productivity) Bill 2013 [No. 2]* (Cth) and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [No. 2]* (Cth) (Building Bills) to the Senate Education and Employment Legislation Committee (Committee) for inquiry and report by 15 March 2016.

The Building Bills are in the same form as the two bills first introduced into the Parliament on 14 November 2013. The Building Bills and predecessor legislation have been the subject of over a dozen inquiries by various Parliamentary Committees and other bodies over a number of years.

The Australian chamber has actively participated in the various reviews and inquiries into industrial relations regulation of the building and construction industry. As such, this submission should be considered as part of a body of material which collectively form the Australian Chamber position. This includes:

- the Australian Chamber submission to the Senate Standing Education and Employment Legislation Committee's inquiry into the *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) in November 2013 (**attached**);
- the Australian Chamber submission to the then Senate Standing Committee on Education, Employment and Workplace Relations' inquiry into the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011* (Cth) dated 20 January 2012;
- the Australian Chamber submission to the then Senate Standing Committee on Education, Employment and Workplace Relations' inquiry into the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009* in July 2009;
- the Australian Chamber response submission to the Wilcox Report Recommendations in May 2009;
- the Australian Chamber submission to the Hon Murray Wilcox QC review into the proposed Building and Construction Division of Fair Work Australia dated 5 December 2008.

Recently, the Building Bills were:

- introduced into the House of Representatives on 14 November 2013, debated on 2 December and 12 December 2013, and agreed to on 12 December 2013; and
- introduced into the Senate on 11 February 2014, debated on 4 March, 5 March, 12 August and 17 August 2015, and negatived on 17 August 2015.

During this time, the Building Bills were subject to the following Parliamentary scrutiny:

- referred to the Senate Education and Employment Legislation Committee on 14 November 2013, a public hearing was held on 26 November 2013 and the Committee reported on 2 December 2014;
- referred to the Senate Education and Employment References Committee on 4 December 2013, public hearings were held on 6 February, 12 March and 17 March 2014 and the Committee reported on 27 March 2014;



- commented on by the Senate Standing Committee for the Scrutiny of Bills on 11 December 2013 and 26 March 2014; and
- commented on by the Joint Committee on Human Rights on 11 February, 26 August and 28 October 2014.

The recent history of the building and construction industry has seen:

- multiple Royal Commissions finding there to be a culture of union thuggery, intimidation and lawlessness;
- reforms introduced via legislative response;
- the resumption of normal standards of behaviour;
- the reforms being wound back as a result of a subsequent change in Government;
- a reversion to union thuggery, intimidation and lawlessness.

As custodians of the economic and social wellbeing of all Australians, it is time for all Parliamentarians to break the cycle of union thuggery, intimidation and lawlessness that has plagued the building and construction industry.

To do so would have obvious benefits for the industry and its participants. No less significant would be the broader social dividend. The Government's Mid-Year Economic and Fiscal Outlook noted that the Government is supporting record levels of infrastructure investment through its \$50 billion infrastructure package announced in the 2014-15 Budget, increasing the economy's productive capacity. As part of this process, the Government is partnering with the States and Territories to release capital to fund productive infrastructure through the Asset Recycling Initiative. When combined with State/territory and private sector funding, the package is expected to create additional infrastructure investment in excess of the \$125 billion.<sup>1</sup> Significant investment in infrastructure is necessary to create jobs in the construction industry which contributes to over 9 per cent of Australian employment. The performance of the sector has a broad ripple effect across the economy.

With an ageing population, declining commodities prices and sources of economic activity changing off the back of the downturn in the minerals sector, the public purse is coming under increased pressure. It is critical that the infrastructure necessary to support living standards, including hospitals, schools and roads is delivered as efficiently as possible, with value for money for Australian taxpayer. We need a building and construction industry that operates safely, productively, harmoniously and lawfully.

Submissions will be made by Australian Chamber members that address matters particular to their specific interests and views. The Australian Chamber commends these submissions to the Committee. The Australian Chamber stands by its submission dated November 2013. This submission is made without prejudice to specific interests and views advanced by our members.

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<sup>1</sup> Budget 2014-15, Building Australia's Infrastructure, May 2014, p. 1.

## 2 Importance of the building and construction industry to the national economy

The significance of the building and construction industry to the economy has been highlighted by Master Builders Australia, stating:

*The building and construction industry accounts for close to 8 per cent of gross domestic product, and around 9 per cent of employment in Australia. It makes an essential contribution to the generation of wealth and welfare of the community. At the same time, the wellbeing of the building and construction industry is closely linked to the prosperity of the domestic economy.<sup>2</sup>*

Australia's changing economic conditions make it necessary to give attention to policy settings concerned with driving investment and job creation. The significant contribution of the building and construction industry and its multiplier effects mean that it has a critical role to play in rebalancing the economy. Infrastructure investment underpins economic growth and has an important part to play in maintaining Australia's living standards. However Australian governments are facing challenges in the provision of infrastructure due to growing community needs, an ageing population and declining revenue, factors which place significant pressure on government budgets. It is critical that public revenue is allocated in the most efficient way possible. Equally, the private sector should also be engaged to the maximum extent possible in the financing and delivery of infrastructure assets. This necessitates the creation of a regulatory environment conducive to private sector investment.

Workplace relations reform is required to address industrial behaviour that results in heightened risk, anti-competitive practices, unnecessary delays and inefficiencies. Combined, these act as a disincentive to investment. The culture of industrial lawlessness that has been reported in multiple Royal Commissions and which is enduring in the building and construction industry warrants specific regulatory attention and has significant economic and social consequences.

## 3 The findings of the Royal Commission into Trade Union Governance and Corruption

Previous Royal Commissions have uncovered wilful defiance, disregard or contempt of the law by the CFMEU and there is evidence that such behaviours have not been adequately addressed by the framework. In order for civil penalties to be an effective deterrent, the penalty levels must be appropriately set. They are not currently serving as an effective deterrent. Since the previous Government abolished the Australian Building and Construction Commission (ABCC), we have seen a return to the sort of behaviour identified by previous Royal Commissions, such as the illegal CFMEU blockade of Melbourne's CBD, alleged secondary boycott activity against Boral simply because it was a supplier to Grocon and reports of intimidation and contractors being locked out of building sites for refusing to give in to union demands.

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<sup>2</sup> Master Builders Australia, 2015/16 Pre-Budget Submission, February 2015, p. 2.

Such behaviours were recently examined by the current Royal Commission into Trade Union Governance and Corruption which was established by Letters Patent issued by the Governor General on 13 March 2014 (Royal Commission). The Commissioner John Dyson Heydon AC QC handed an Interim Report of the Royal Commission into Trade Union Governance and Corruption to the Governor General at Government House in Canberra on 15 December 2014 (Interim Report). The Interim Report dealt with the majority of case studies heard during 2014. The Interim Report was tabled in Parliament on 19 December 2014. The Final Report of the Royal Commission was released by the Government on 30 December 2015.

### 3.1 The Interim Report

In describing the findings contained within the Interim Report, The Final Report states:

70. *The designation ‘Interim’ is to some extent a misnomer. In this context it denotes only that this Report was delivered pursuant to para (n) of the Terms of Reference (rather than this final Report, which is delivered at the end of the Commission’s term and the delivery of which signals the end of the Commission’s operations). The Report delivered on 15 December 2014 was not ‘Interim’ in the sense that its findings or recommendations were tentative, provisional or subject to change.*
71. *On the contrary, every finding contained in the Interim Report was final, unless specifically stated otherwise, or unless sufficient contrary evidence came to light...<sup>3</sup>*

The findings of the Interim Report therefore warrant close attention. The Interim Report suggested that case studies associated with the CFMEU “raise fundamental issues about the regulation of the building and construction industry, and the culture of wilful defiance of the law which appears to lie at the core of the CFMEU”.<sup>4</sup> The Interim Report found that the “evidence in relation to the CFMEU case studies indicates that a number of CFMEU officials seek to conduct their affairs with a deliberate disregard for the rule of law”<sup>5</sup>, stating that:

- The evidence is suggestive of the existence of a pervasive and unhealthy culture within the CFMEU, under which:*
- (a) the law is to be deliberately evaded, or crashed through as an irrelevance, where it stands in the way of achieving the objectives of particular officials;*
  - (b) officials prefer to lie rather than reveal the truth and betray the union;*
  - (c) the reputations of those who speak out about union wrongdoing become the subject of baseless slurs and vilification.<sup>6</sup>*

The Interim Report also identified that:

- The conduct undertaken by officers of the CFMEU has included:*
- (a) conduct which may constitute the criminal offences of blackmail and extortion by officers of the CFMEU in Victoria and Queensland;*

<sup>3</sup> Final Report of the Royal Commission into Trade Union Governance and Corruption (Volume 1)2015, p. 34.

<sup>4</sup> Interim Report of the Royal Commission into Trade Union Governance and Corruption, 2014, p. 26.

<sup>5</sup> Ibid., p. 1008.

<sup>6</sup> Ibid., p. 1008.

- (b) *behaviour by officers of the CFMEU in Victoria and Queensland which may give rise to contraventions of the boycott, cartel and other provisions of the Competition and Consumer Act 2010 (Cth);*
- (c) *covert action undertaken by the New South Wales Secretary of the CFMEU to convince senior employees of Cbus secretly to hand over to the CFMEU the private information of Cbus members and the subsequent misuse of that information by the State Secretary;*
- (d) *the making of a death threat by one CFMEU Construction and General New South Wales Divisional organiser to a fellow organiser...the failure on the part of senior officials to undertake any proper and considered investigation into the incident, and the subsequent victimisation of the complainant by those same officials;*
- (e) *organising and engaging in industrial action in deliberate defiance of orders made by the Fair Work Commission and the Federal Circuit Court of Australia; and*
- (f) *obstructing Fair Work Building Commission inspectors in the performance of their statutory duties through intimidation, insults and generally threatening behaviour.*<sup>7</sup>

### 3.1.1 Boral case study

The Royal Commission drew on a number of case studies in making such findings, including a CFMEU black ban of Boral preventing the pouring of concrete at CFMEU-controlled sites in Melbourne as a part of an ongoing dispute between the CFMEU and Grocon Pty Ltd.<sup>8</sup> The black ban continued in defiance of orders obtained by Boral from the Supreme Court restraining the CFMEU from carrying on the ban.<sup>9</sup> The Director of Fair Work Building Industry Inspectorate commenced separate proceedings against the CFMEU and the ACCC commenced Federal Court proceedings against the CFMEU in November 2014 alleging contraventions of the *Competition and Consumer Act 2010 (Cth)*.

In describing the conduct of the CFMEU toward Boral, the Interim Report states:

*In the present case, the CFMEU had two purposes in engaging in the ban of Boral. One was to cause substantial damage to Boral so as to intimidate it into stopping supply to Grocon. The second was, by intimidating Boral into ceasing supply to Grocon, to cause substantial damage to Grocon...*

*Plainly, the actual loss suffered by Boral from the CFMEU's conduct may be substantial. Boral estimates it has suffered loss of between \$8-\$10 million to the end of June 2014. It has clearly lost many orders of concrete...*<sup>10</sup>

The Interim Report also makes out a clear case for change to the regulatory framework to address such behaviours and the anti-competitive practices engaged in by the CFMEU, stating:

*...the CFMEU's conduct in relation to Boral suggests that there may be a number of deficiencies with the existing legal and regulatory framework in relation to secondary*

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<sup>7</sup> Interim Report of the Royal Commission into Trade Union Governance and Corruption, 2014 p. 1009.

<sup>8</sup> Ibid, p. 1016.

<sup>9</sup> Ibid, p. 1016.

<sup>10</sup> Ibid, p. 1083.

*boycotts, the enforcement of court orders, the regulation of trade unions generally and the regulation of, and the duties owed by, trade union officials.*

*In particular, the conduct suggests the existence of the following possible problems:*

- (a) The ineffectiveness of the current secondary boycott provisions in ss 45D and 45E of the Competition and Consumer Act 2010 (Cth) to deter illegal secondary boycotts by trade unions.*
- (b) The absence of specific provisions making it unlawful for the competitors of the target of a secondary boycott knowingly to supply a product or service in substitute for a supply by the target.*
- (c) An inability or unwillingness by the regulatory authorities to investigate and prosecute breaches of the secondary boycott provisions by trade unions speedily. There may be a number of root causes for this problem: difficulties in obtaining documentary evidence, lack of co-operation of witnesses who may fear repercussions from giving evidence, the potential overlap between the roles of a number of regulators and difficulties in ensuring compliance with court orders made in relation to secondary boycott conduct.*
- (d) The absence of any speedy and effective method by which injunctions granted by a court restraining a trade union from engaging in an illegal secondary boycott can be enforced. The Byzantine complexity of the law of contempt, and its ineffectiveness to deter secondary boycott conduct by a trade union, is amply demonstrated by the contempt proceedings commenced by Grocon and Boral in the Victorian Supreme Court.*
- (e) The absence of a single statutory regulator dedicated to the regulation of trade unions with sufficient legal power to investigate and prosecute breaches of the secondary boycott provisions.*
- (f) The absence of appropriate legal duties owed by the officers of trade unions to their members, and the absence of appropriate mechanisms by which such officers can be held accountable to their members.*

*It is also necessary to consider possible improvements in relation to the administration of the law by both regulators and courts.<sup>11</sup>*

Importantly, the Interim Report highlighted the difficulties experienced by the relevant agencies in obtaining the evidence necessary to institute proceedings to address unlawful industrial conduct in the industry, stating:

*... It is worth noting that nearly two years have passed since the black ban began.*

*However, it is clear that public regulators are likely to have grave difficulties in obtaining evidence where witnesses are reluctant to speak against parties to illegal conduct in view of the risk of retaliation.*

*A legal system which does not provide swift protection against the type of conduct which Boral alleges it has suffered at the hands of the CFMEU, and which does not have a mechanism for the swift enforcement of court orders, is fundamentally defective. The defects are so great as to make it easy for those whose goal is to defy the rule of law. The*

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<sup>11</sup> Interim Report of the Royal Commission into Trade Union Governance and Corruption, 2014, pp. 1107-1108.

*defects reveal a huge problem for the Australian state and its numerous federal, State and Territory emanations. The defying of the Victorian Supreme Court's injunctions for nearly two years, and the procedural history outlined above, will make the Australian legal system an international laughing stock. A new form of 'sovereign risk' is emerging – for investors will not invest in countries where their legal rights receive no protection in practice. At least so far as the courts are concerned, it may be appropriate for consideration to be given to procedures which ensure the swift determination of contempt applications, complemented where necessary by appropriate court rules and legislation.<sup>12</sup>*

### 3.1.2 Other case studies

The unlawful conduct to which Boral was subject is not an isolated occurrence and the Interim Report highlights other case studies, including one examining the conduct of officers of the Queensland Branch of the CFMEU toward the Smithbridge Group Pty Ltd companies.<sup>13</sup> In particular, the Interim Report finds that certain CFMEU officials:

*...pursued a campaign against Smithbridge Group in order to force companies in that group to enter into enterprise agreements with the CFMEU on terms which required the companies to make payments to BERT, BEWT and CIPQ. The campaign involved CFMEU officials (i) dictating to customers of the Smithbridge Group that Smithbridge Group be removed from their sites, and otherwise applying pressure designed to turn those customers away from Smithbridge Group, and (ii) threatening to kill off Smithbridge Group through such action unless they signed the union's form of enterprise agreement and arranged for all employees to become union members.<sup>14</sup>*

In describing the nature of the campaign, the Interim Report states:

*The 'campaign' the CFMEU waged against Universal Cranes involved two steps. One was the officers of the CFMEU threatening to apply pressure to customers of Universal Cranes to stop dealing with Universal Cranes unless and until the Union's demands that Universal Cranes and others enter into the Union's form of EBA were satisfied. The other involved the CFMEU acting on those threats when its demands were not satisfied by entering work sites and shutting down the operations of Universal Cranes or Smithbridge on those sites.<sup>15</sup>*

The CFMEU's conduct is described in the Interim Report as involving "a deliberate and protracted campaign of industrial blackmail and extortion"<sup>16</sup> and the following observations are made:

*The decision Mr Smith had made to buckle to the union pressure and have Universal Cranes agree to sign a CFMEU pattern agreement was made under very considerable economic duress. The CFMEU attack on the company had caused substantial loss for the company and the workers. Universal Cranes' equipment was sitting in the yard because the company could not get onto sites. The company's workers were 'scratching to get 40 hours*

<sup>12</sup> Interim Report of the Royal Commission into Trade Union Governance and Corruption, 2014, p. 1114.

<sup>13</sup> Ibid., p. 1399.

<sup>14</sup> Ibid., p. 1400.

<sup>15</sup> Ibid., p. 1413.

<sup>16</sup> Ibid., p. 1400.

*a week work' with a consequence that the company was having to start putting workers off. Mr Smith's view was that he had no alternative but to sign the agreement.*

*The union's demand for an increase in membership amongst Universal Cranes employees also placed great pressure on the workers...*

*The conduct of the CFMEU in the course of its dealings with Mr Smith does not make pleasant reading. It cannot be regarded as the 'legitimate use of industrial muscle'. It cannot be regarded as bona fide negotiation – for every move by Mr Smith towards consensus was met by the introduction of an entirely fresh demand. It cannot be regarded as justified in the interests of employees – for many of the benefits generated by BERT do not flow to the employees whose employer provides BERT with its funding. It would be kind to call the CFMEU's conduct paltering. It was nothing but a brutal and ruthless drive for complete capitulation.<sup>17</sup>*

The Interim Report also explores the conduct of certain officers of the Victorian Branch of the CFMEU (including the Victorian State Secretary) toward West Homes Pty Ltd and Pentridge Village Pty Ltd. Among the Interim Report's findings in relation to that conduct are findings that the CFMEU applied "illegitimate pressure" on "builders and subcontractors to enter into the CFMEU form of enterprise bargaining agreement" and sought to exclude non-union members from the site.<sup>18</sup> The Interim Report also states:

*An investigation into the Pentridge site has also revealed a number of discrete instances where Mr Setka engaged in grossly offensive and aggressive conduct. It indicates a type of behaviour that one would not expect to see from any trade union leader. The behaviour, and the underlying attitudes it reveals, fall well short of the professional standards expected of a State Secretary of the CFMEU.<sup>19</sup>*

The Interim Report states that:

*This case study illustrates the way in which officers of the CFMEU, and persons appointed by them to act on the CFMEU's behalf, misuse their powers and position in order to force builders, subcontractors and workers to enter into agreements and join a union against their will.<sup>20</sup>*

...

*Even if Mr Setka and others initially held strong and genuine concerns about safety on the site, that does not excuse the behaviour that is now under consideration. That behaviour was not motivated by a concern for safety. It was motivated by a desire to control the work site and the workers on it, increase the membership base of the union, and increase the number of subcontractors bound to the CFMEU's form of enterprise bargaining agreement*

<sup>17</sup> Interim Report of the Royal Commission into Trade Union Governance and Corruption, 2014, pp. 1434 - 1435.

<sup>18</sup> Ibid., p. 1533.

<sup>19</sup> Ibid., p. 1533.

<sup>20</sup> Ibid., p. 1559.

*(the terms of which require subcontractors to make payments to Incolink and Cbus, two companies in which the CFMEU has a substantial financial interest).<sup>21</sup>*

On 20 October 2014, the Governor General amended the Letters Patent by extending the deadline for delivery of the Royal Commission's report to 31 December 2015. While final recommendations as to law reform may be made at the conclusion of that process, the evidence detailed within the Interim Report combined with the persistent culture of lawlessness described by two previous Royal Commissions already provide strong justification for industry specific regulation and the existence of information gathering powers.

Evidence received "raise[s] fundamental issues about the regulation of the building and construction industry, and the culture of wilful defiance of the law which appears to lie at the core of the CFMEU."<sup>22</sup> Among the recommendations contained within the Interim Report is that the Interim Report and other relevant materials be referred to the appropriate authority for consideration of whether the CFMEU or relevant officials should be prosecuted.<sup>23</sup> Commissioner Heydon also produced a Confidential Report, which has not been publicly released "in order to protect the physical well-being of ... witnesses and their families".<sup>24</sup> Commissioner Heydon considered it "unfortunate" that the Confidential Report could not be published, because it "reveals grave threats to the power and authority of the Australian state".<sup>25</sup>

## 3.2 The Final Report

As stated the Royal Commission's inquiry continued into 2015, with the Governor General amending the Letters Patent by extending the deadline for delivery of the Royal Commission's report to 31 December 2015. The final report of the Royal Commission into Trade Union Governance and Corruption was publicly released on 30 December 2015, alleging "widespread" and "deep-seated" misconduct by unions and officials and suggesting "[i]t would be utterly naïve to think that what has been uncovered is anything other than the small tip of an enormous iceberg".<sup>26</sup>

After hearing evidence from 505 witnesses over 189 hearing days the final report lists 79 recommendations to improve the governance of registered organisations, with many of these reflecting areas of concern identified by the Australian Chamber. The Royal Commission has also made 93 referrals for proceedings relating to possible breaches of the law with more than half relating to potential criminal prosecutions. While using the term 'may' in its findings, the Royal Commission stated that such use "*is not intended to suggest merely there was some vague possibility of breach. The word 'may' is used to convey the view that there is credible evidence before the Commission raising a probable presumption that a breach of law, regulation of professional standard has occurred.*"<sup>27</sup>

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<sup>21</sup> Interim Report of the Royal Commission into Trade Union Governance and Corruption, 2014, p. 1560.

<sup>22</sup> Ibid., p. 26.

<sup>23</sup> Ibid., p. 1010.

<sup>24</sup> Ibid., p. 30.

<sup>25</sup> Ibid., p. 30.

<sup>26</sup> Final Report of the Royal Commission into Trade Union Governance and Corruption (Volume 1) 2014, p. 12.

<sup>27</sup> Ibid. (Volume 1), p. 55.

The widespread misconduct described within the report traverses a range of behaviours that it suggests 'may' have occurred including but not limited to:

- actions favouring the interests of the union over the members;
- financial misconduct and the misappropriation and use of union funds for private purposes;
- arranging for right of entry tests to be sat by persons other than the candidate;
- abuses of rights of entry;
- use of blackmail and extortion for the purposes of achieving industrial ends;
- commission of criminal offences such as the making of death threats and conspiracy to defraud;
- procuring payments from employers for the purposes of 'industrial peace';
- false inflation of membership numbers and payment of bogus membership dues;
- creation of false records, insufficiency or absence of proper records and destruction of records;
- engaging in contraventions of the boycott and cartel provisions of the *Competition and Consumer Act 2010* (Cth);
- misuse of private information of superannuation fund members for industrial purposes.

In findings specific to the building and construction industry, the Royal Commission found:

*The conduct that has emerged discloses systemic corruption and unlawful conduct, including corrupt payments, physical and verbal violence, threats, intimidation, abuse of right of entry permits, secondary boycotts, breaches of fiduciary duty and contempt of court.*<sup>28</sup>

Specific examples of conduct uncovered by the Royal Commission as it continued its inquiry in 2015 and which are related to building and construction industry participants were described as follows:

- a former lead organiser for the CFMEU ACT conceded during hearings in Canberra that he had personally received \$100,000 in secret payments from employers;<sup>29</sup>
- a former president of the CFMEU QLD received approximately \$150,000 worth of free work on his home, arranged or facilitated by a senior employee of a major building company with the knowledge of his superior;<sup>30</sup>
- the CFMEU in Queensland caused a number of tonnes of documents to be removed from the CFMEU's Brisbane office and disposed of on the same day that the CFMEU received a notice to produce from the Royal Commission;<sup>31</sup>
- an organiser in the CFMEU NSW received \$2,500 per week in secret and possibly unlawful cash payments.<sup>32</sup>

<sup>28</sup> Final Report of the Royal Commission into Trade Union Governance and Corruption (Volume 5), p. 393.

<sup>29</sup> Ibid. (Volume 1), p. 25.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid. (Volume 1), p. 26.

<sup>32</sup> Ibid.

In summarising the nature of the conduct and culture unearthed within the CFMEU, the Royal Commission stated:

*There is a long standing malignancy or disease within the CFMEU. One symptom is regular disregard for industrial laws by CFMEU officials. Another symptom of the disease is that CFMEU officials habitually lie rather than 'betraying' the union. Another symptom of the disease is that CFMEU officials habitually show contempt for the rule of law.<sup>33</sup>*

The framework as it stands is clearly ineffective. The Australian Chamber maintains that continued industrial lawlessness necessitates industry-specific regulation to facilitate a productive, safe and harmonious building and construction industry where all industry participants respect the rule of law.

## 4 The findings of previous royal commissions

The culture of union lawlessness identified in the Royal Commission's Interim Report and Final Report reflects the CFMEU's history of behaviour as reflected in the findings of previous Royal Commissions. As noted in the Royal Commission's Final Report:

*The issues identified are not new. The same issues have been identified in reports of three separate Royal Commissions conducted over the past 40 years: the Winneke Royal Commission in 1982, the Gyles Royal Commission in 1992 and the Cole Royal Commission in 2003.<sup>34</sup>*

By Letters Patent dated 29 August 2001, the Honourable Terence Cole RFD QC was appointed a Royal Commissioner to inquire into certain matters relating to the building and construction industry. The Final Report of the Cole Royal Commission was tabled in Parliament on 26 and 27 March 2003, stating that the findings demonstrated "an urgent need for structural and cultural reform".<sup>35</sup> The following findings were amongst those recorded in the Cole Royal Commission's Final Report:

- widespread disregard of, or breach of, enterprise bargaining laws;
- widespread disregard of, or breach of, freedom of association laws;
- widespread requirement to have union-endorsed enterprise bargaining agreements before being permitted to commence work on major projects;
- widespread requirement for employees of subcontractors to become members of unions in association with their employer obtaining a union-endorsed enterprise bargaining agreement;
- widespread requirement to employ union-nominated persons in critical positions on building projects;
- widespread application of, and surrender to, inappropriate industrial pressure;
- widespread use of occupational health and safety as an industrial tool;
- widespread making of, and receipt of, inappropriate payments;

<sup>33</sup> Final Report of the Royal Commission into Trade Union Governance and Corruption (Volume 5), 2015, p. 401.

<sup>34</sup> Ibid. (Volume 5), 2015, p. 393.

<sup>35</sup> Final Report of the Royal Commission into the Building and Construction Industry, Summary of Findings and Recommendations (Volume One), Royal Commissioner, The Honourable Terrence Rhoderic Hudson Cole RFD QC, February 2003, p. 3.

- unlawful strikes and threats of unlawful strikes;
- threatening and intimidatory conduct;
- disregard of, or breach of, the right of entry provisions;
- disregard of Australian Industrial Relations Commission (AIRC) and court orders;
- disregard by senior union officials of unlawful or inappropriate acts by inferior union officials;
- reluctance of employers to use legal remedies available to them;
- inflexibility in workplace arrangements;
- endeavours by unions, particularly the Construction, Forestry, Mining and Energy Union (CFMEU), to regulate the industry; and
- disregard of the rule of law.<sup>36</sup>

The Final Report states that such findings “demonstrate an industry which departs from the standards of commercial and industrial conduct exhibited in the rest of the Australian economy. They mark the industry as singular. They indicate an urgent need for structural and cultural reform”.<sup>37</sup>

Among the recommended reforms to address such conduct was:

*the creation of the Australian Building and Construction Commission (ABCC). This body will be responsible for monitoring conduct in the industry, and prosecuting unlawful industrial action, breaches of freedom of association laws, and addressing all complaints of unlawfulness in the industry. It will become a ‘one stop shop’ for all complaints. It will have the power to commence proceedings to restrain unlawful industrial action, and to restrain secondary boycotts.*<sup>38</sup>

In describing the intended role of the ABCC, the Final Report stated:

*There will be obligations imposed upon contractors, subcontractors, union officials and workers to advise the ABCC of possible unlawful conduct, be it underpayment or non-payment of wages, taxation avoidance, departures from proper standards of occupational health and safety, breaches of freedom of association provisions, unlawful industrial activity, or any other form of unlawfulness. It will be the responsibility of the ABCC either itself to address this unlawfulness, or where there is another State or Federal body more suited to its investigation, to refer the matter to that body but with the obligation to monitor and ensure any complaint is properly addressed. This body will remove any reason that any participant in the industry has to engage in unlawful or inappropriate conduct. It will also ensure that unlawful conduct comes to the attention of an entity established to ensure the law is adhered to.*<sup>39</sup>

<sup>36</sup> Final Report of the Royal Commission Into the Building and Construction Industry, Summary of Findings and Recommendations (Volume One), Royal Commissioner, The Honourable Terrence Rhoderic Hudson Cole RFD QC, February 2003, p. 6.

<sup>37</sup> Ibid., p. 6.

<sup>38</sup> Ibid., p. 14.

<sup>39</sup> Final Report of the Royal Commission Into the Building and Construction Industry, Summary of Findings and Recommendations (Volume One), Royal Commissioner, The Honourable Terrence Rhoderic Hudson Cole RFD QC, February 2003, pp. 13 -14.

The nature of the behaviours that led to such recommendations were not dissimilar from the behaviours unearthed in the findings of a Royal Commission into Productivity in the Building Industry in NSW in 1992, over ten years earlier, in which Commissioner Roger Gyles QC found that “[o]bservance of the law and law enforcement in general play very little part in the industry. The law of the jungle prevails. The culture is pragmatic and unprincipled. The ethos is to catch and to kill your own”.<sup>40</sup> In describing the serious consequences of such disregard for the rule of law, Commissioner Gyles went on to state:

*The effect of illegal activities upon the culture of the industry and upon the commercial and industrial morality of participants in it is, in the long run, greater than the direct economic consequences. Once it becomes acceptable to break, bend, evade or ignore the law and ethical responsibilities, there is no shortage of ways and means to do so. Those who pay and suffer the other consequences of disruption in the end are the public.*<sup>41</sup>

## 5 The economic benefits of prior reform

Notwithstanding the serious social consequences flowing from a culture of disregard for the rule of law, there are also significant economic impacts. The *Building and Construction Industry Improvement Act 2005* (Cth) (BCII Act) was passed in response to the findings of the Cole Royal Commission and sought to address the culture of lawlessness in the building and construction industry. The BCII Act established the ABCC which resulted in significant improvements in the performance of the sector. Research conducted for Master Builders Australia by Independent Economics found that when the ABCC was in place:

- building and construction industry productivity grew by more than nine per cent;
- consumers were better off by around \$7.5 billion annually; and
- fewer working days were lost through industrial action.

As noted by the Royal Commission in its Final Report the Productivity Commission also concluded that:

*‘a direct connection of lower industrial disputes and the operations of the ABCC appears highly plausible’ and ‘on balance, it is likely that the ABCC reduced industrial disputes’.*<sup>42</sup>

However, the ABCC was replaced by the Office of the Fair Work Building Industry Inspectorate following the enactment of the *Fair Work (Building Industry) Act 2012* (FW(BI) Act). There were limitations placed on the new agency’s powers together with the removal of building industry specific laws that prescribed higher penalties for breaches, and the narrowing of the circumstances in which industrial action is unlawful. Conduct of the nature described earlier in this submission has resumed. The research conducted for Master Builders Australia by Independent Economics found that abolishing the ABCC led to a permanent loss in construction activity, a loss in consumer real wages and a significant increase in working days lost.

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<sup>40</sup> Reproduced from Master Builders Australia, ‘Crime and the Construction Sector’, Paper presented at the conference Crime Against Business, convened by the Australian Institute of Criminology, Melbourne, 18-19 June 1998, p. 3.

<sup>41</sup> *ibid.*

<sup>42</sup> Final Report of the Royal Commission into Trade Union Governance and Corruption (Volume 5), 2015, p. 426.

## 6 The effect of the Building Bills

The Royal Commission has found that the continuing corruption and lawlessness that it revealed suggests a need to revisit, once again, the regulation of the building and construction industry.

The material before it resulted in the Productivity Commission making the following recommendations specifically targeting the sector:

### **Recommendation 60**

*For the purpose of seeking to combat the culture of disregard for the law within the Construction, Forestry, Mining and Energy Union, consideration be given to the enactment of special legislation disqualifying those officers of the Construction, Forestry, Mining and Energy Union that Parliament considers are not fit and proper persons from holding office in any registered organisation or branch for a specified period.*

### **Recommendation 61**

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

### **Recommendation 62**

*Legislation be enacted conferring the building and construction industry regulator with compulsory investigatory and information gathering powers equivalent to those possessed by other civil regulators. The powers set out in the Building and Construction Industry (Improving Productivity) Bill 2013 (Cth) appear appropriate in this regard.*

### **Recommendation 63**

*There should be oversight by the Commonwealth Ombudsman of the powers exercised by the building and construction regulator in the manner provided for in the Building and Construction Industry (Improving Productivity) Bill 2013 (Cth).*

### **Recommendation 64**

*Consideration be given to redrafting the use/derivative use immunity provisions in clauses 102 and 104 of the Building and Construction Industry (Improving Productivity) Bill 2013 (Cth) to provide protections equivalent to those available in relation to the powers exercised by the Australian Securities and Investments Commission.*

### **Recommendation 65**

*The building and construction industry regulator continue to investigate and enforce the Fair Work Act 2009 (Cth) and other existing designated building laws. The power of the building and construction industry regulator to commence and maintain enforcement proceedings should not be constrained according to whether any other proceedings in respect of the same conduct have been settled. Accordingly, ss 73 and 73A of the Fair Work (Building Industry) Act 2012 (Cth) should be repealed.*

### **Recommendation 66**

*The Fair Work Act 2009 (Cth) be amended:*

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

As recommended by the Royal Commission the Building Bills would re-establish a regular specific regulator in the form of the ABCC as well as effecting a number of important reforms to address the behaviours highlighted in the findings of the various Royal Commissions which are inadequately addressed by the legal framework. The main object of the Building Bills is to 'provide an improved workplace relations framework for building work so 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'.<sup>43</sup>

The proposed laws would enable a stronger response to the sort of unlawful behaviour that has been uncovered by multiple Royal Commissions and which is continuing to be reported by:

- improving the bargaining framework to encourage genuine bargaining at the workplace level;
- promoting respect for the rule of law;
- ensuring respect for the rights of building industry participants;
- ensuring that building industry participants are accountable for their unlawful conduct;
- providing effective means for investigating and enforcing the Act;
- improving work health and safety in building work;
- encouraging the pursuit of high levels of employment in the building industry; and
- providing assistance and advice to building industry participants.<sup>44</sup>

The Building Bills would provide the ABCC with powers proven to be effective while it existed under the BCII Act. If passed they would:

- enable the Minister to issue a Building Code prescribing the standards which building industry participants who undertake Commonwealth funded building work are required to comply with;<sup>45</sup>
- introduce stronger laws to address unlawful industrial action and unlawful picketing;<sup>46</sup>
- prohibit the coercion of persons in relation to the engagement of contractors and employees or choice of superannuation fund, and coercion or undue pressure in relation to industrial instruments;<sup>47</sup>

<sup>43</sup> *Building and Construction Industry (Improving Productivity) Bill 2013 [No 2] (Cth)*, cl. 3(1).

<sup>44</sup> *Building and Construction Industry (Improving Productivity) Bill 2013 [No 2] (Cth)*, cl. 3(2).

<sup>45</sup> *Building and Construction Industry (Improving Productivity) Bill 2013 [No 2] (Cth)*, cl. 34.

<sup>46</sup> *Building and Construction Industry (Improving Productivity) Bill 2013 [No 2] (Cth)*, ch. 5.

<sup>47</sup> *Building and Construction Industry (Improving Productivity) Bill 2013 [No 2] (Cth)*, ch. 6.

- enable the ABCC to require a person to give information, produce documents or answer questions relating to an investigation of a suspected contravention of the BCI(IP) Bill or a designated building law by a building industry participant;<sup>48</sup>
- enable an authorised applicant, who includes an inspector or a person affected by the contravention, to apply for an order relating to the contravention. The courts would be able to grant injunctions, order damages, and impose a civil penalty.<sup>49</sup>

Unlawful union behaviour on construction sites is indefensible. A strong and effective legislative framework is required to address such behaviour. The Australian Chamber continues to support the passage of the Building Bills, including the re-establishment of the ABCC to replace the Fair Work Building Industry Inspectorate and the restoration of the examination powers of the ABCC to their original strength under the BCII Act.

## 7 About the Australian Chamber

### 7.1 Who We Are

The Australian Chamber of Commerce and Industry speaks on behalf of Australian business at home and abroad.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, making us Australia's most representative business organisation.

We speak on behalf of the business sector to government and the community, fostering a culture of enterprise and supporting policies that keep Australia competitive.

We also represent Australian business in international forums.

Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses also get involved through our Business Leaders Council

### 7.2 What We Do

The Australian Chamber strives to make Australia a great place to do business in order to improve everyone's standard of living. We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety and employment, education and training.

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<sup>48</sup> *Building and Construction Industry (Improving Productivity) Bill 201* [No 2] (Cth), ch. 7.

<sup>49</sup> *Building and Construction Industry (Improving Productivity) Bill 2013* [No 2] (Cth), ch. 8.



We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

## Australian Chamber Members

**AUSTRALIAN CHAMBER MEMBERS:** BUSINESS SA CANBERRA BUSINESS CHAMBER CHAMBER OF COMMERCE  
NORTHERN TERRITORY CHAMBER OF COMMERCE & INDUSTRY QUEENSLAND CHAMBER OF COMMERCE &  
INDUSTRY WESTERN AUSTRALIA NEW SOUTH WALES BUSINESS CHAMBER TASMANIAN CHAMBER OF  
COMMERCE & INDUSTRY VICTORIAN' CHAMBER OF COMMERCE & INDUSTRY **MEMBER NATIONAL INDUSTRY**  
**ASSOCIATIONS:** ACCORD – HYGIENE, COSMETIC & SPECIALTY PRODUCTS INDUSTRY **AGED AND COMMUNITY**  
**SERVICES AUSTRALIA** AIR CONDITIONING & MECHANICAL CONTRACTORS' ASSOCIATION **ASSOCIATION OF**  
**FINANCIAL ADVISERS** ASSOCIATION OF INDEPENDENT SCHOOLS OF NSW **AUSTRALIAN SUBSCRIPTION**  
**TELEVISION AND RADIO ASSOCIATION** AUSTRALIAN BEVERAGES COUNCIL LIMITED AUSTRALIAN DENTAL  
ASSOCIATION AUSTRALIAN DENTAL INDUSTRY ASSOCIATION AUSTRALIAN FEDERATION OF EMPLOYERS &  
INDUSTRIES AUSTRALIAN FEDERATION OF TRAVEL AGENTS **AUSTRALIAN FOOD & GROCERY COUNCIL**  
AUSTRALIAN HOTELS ASSOCIATION **AUSTRALIAN INTERNATIONAL AIRLINES OPERATIONS GROUP**  
AUSTRALIAN MADE CAMPAIGN LIMITED **AUSTRALIAN MINES & METALS ASSOCIATION** AUSTRALIAN PAINT  
MANUFACTURERS' FEDERATION **AUSTRALIAN RECORDING INDUSTRY ASSOCIATION** AUSTRALIAN RETAILERS'  
ASSOCIATION AUSTRALIAN SELF MEDICATION INDUSTRY AUSTRALIAN STEEL INSTITUTE **AUSTRALIAN**  
**TOURISM AWARDS INC** AUSTRALIAN TOURISM EXPORT COUNCIL **AUSTRALIAN VETERINARY ASSOCIATION**  
BUS INDUSTRY CONFEDERATION **BUSINESS COUNCIL OF CO-OPERATIVES AND MUTUALS** CARAVAN  
INDUSTRY ASSOCIATION OF AUSTRALIA **CEMENT CONCRETE AND AGGREGATES AUSTRALIA** COMMERCIAL  
RADIO AUSTRALIA **CONSULT AUSTRALIA** CUSTOMER OWNED BANKING ASSOCIATION **CRUISE LINES**  
**INTERNATIONAL ASSOCIATION** DIRECT SELLING ASSOCIATION OF AUSTRALIA **ECOTOURSIM AUSTRALIA**  
EXHIBITION AND EVENT ASSOCIATION OF AUSTRALASIA **FITNESS AUSTRALIA** HOUSING INDUSTRY  
ASSOCIATION **HIRE AND RENTAL INDUSTRY ASSOCIATION LTD** LARGE FORMAT RETAIL ASSOCIATION **LIVE**  
**PERFORMANCE AUSTRALIA** MASTER BUILDERS AUSTRALIA **MASTER PLUMBERS' & MECHANICAL SERVICES**  
**ASSOCIATION OF AUSTRALIA** MEDICAL TECHNOLOGY ASSOCIATION OF AUSTRALIA **NATIONAL DISABILITY**  
**SERVICES NATIONAL ELECTRICAL & COMMUNICATIONS ASSOCIATION** NATIONAL FIRE INDUSTRY  
ASSOCIATION **NATIONAL RETAIL ASSOCIATION** NATIONAL ROAD AND MOTORISTS' ASSOCIATION **NSW TAXI**  
**COUNCIL** NATIONAL ONLINE RETAIL ASSOCIATION **OIL INDUSTRY INDUSTRIAL ASSOCIATION** PHARMACY  
GUILD OF AUSTRALIA **PHONOGRAPHIC PERFORMANCE COMPANY OF AUSTRALIA** PLASTICS & CHEMICALS  
INDUSTRIES ASSOCIATION **RESTAURANT & CATERING AUSTRALIA** SCREEN PRODUCERS AUSTRALIA  
**VICTORIAN AUTOMOBILE CHAMBER OF COMMERCE**