



# Electrical Trades Union of Australia

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## SUBMISSION

Senate

Education and Employment Committees

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

19 February 2016



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## 1. Executive Summary

The ETU welcomes the opportunity to submit to the Committee in relation to the *Building and Construction Industry (Improving Productivity) Bill 2013 [No. 2]* and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [No. 2]* (ABCC Bills).

The Electrical Trades Union (ETU) is the Electrical, Energy and Services Division of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU). The ETU represents approximately 65,000 workers electrical and electronics workers around the country and the CEPU as a whole represents approximately 100,000 workers nationally, making us one of the largest trade unions in Australia.

As union that represents a large number of workers in the construction sector, it is our members who are under direct, and deliberate threat from the passage of the ABCC Bills.

The Government is once again attempting to repeal the existing *Fair Work (Building Commission) Act* and replace with it the *Building and Construction Industry (Improving Productivity) Act 2013* and *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013*, which as you are no doubt aware, have already been rejected by the Senate.

The existing regulatory regime in the construction sector has seen significant productivity increases since it was introduced in 2007. Indeed, labour productivity in the building and construction industry has grown at 4.1 percent per year under the existing system that the Turnbull Government wants to abolish.

These bills will not improve productivity in the building industry. However, what the bills will do is slash 76 separate worker protections in the typical construction industry employment contract, increase workplace fatalities and injuries through lower health



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and safety, further reduce already scarce apprenticeship opportunities for young workers and cut wages and conditions.

Australians working in the construction industry will encounter fewer opportunities, will have less job security, fewer workplace protections, and have their basic human and civil rights eroded. Both productivity and workers will suffer under this legislation, which ultimately, will only serve to drive down industry efficiency and living standards.

More than one million Australians who work in the construction industry stand to be treated as second-class citizens under this appalling piece of legislation. At a time when unemployment is rising, there has been a significant downturn in the manufacturing and resources sectors and the Government is opening up the Australian job market via Free Trade Agreements, it is manifestly unfair that these working Australians should be subject, again, to the severe threat that these bills and the re-introduction of the ABCC represents.

These bills have already been subjected to inquiry and rejected by the Senate for good reason- they are deeply flawed, inequitable bills that unfairly targets the construction sector, unions, and its workers.

These bills are not in the best interests of the nation. They are part of a politically motivated ideological government agenda against unions.

We urge the Committee to reject these bills.

## **Recommendation 1**

That the Committee recommends against the passage of the *Building and Construction Industry (Improving Productivity) Bill 2013 [No. 2]* and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [No. 2]*.



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## **Recommendation 2**

That the Committee finds that that the *Building and Construction Industry (Improving Productivity) Bill 2013 [No. 2]* and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [No. 2]* breach fundamental legal principles and impinge on basic human rights without sufficient justification.

## **Recommendation 3**

The Committee find that the Government has failed to provide sufficient information and justification in the Explanatory Memorandum that accompany the Bills that would warrant further consideration of passage of the Bills.

## **Recommendation 4**

That the establishment of a National Anti-Corruption body that has jurisdiction over the public and private sectors, as well as parliamentarians, be investigated.

## **Recommendation 5**

That the current regulatory and legal framework for the construction industry is performing well, and whilst it can of course be improved, it should remain.

## **Recommendation 7**

That the re-introduction of the ABCC will lead to an increase in workplace deaths and injuries in the construction sector.



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Unions in Australia have a long and proud history of uniting working people to achieve improvements in their pay, conditions and workplace safety. Unions need to be able to do our job. Our job is to protect and enhance workers rights, wages and safety in the workplace.

Many of the most valued parts of Australian living standards have come about as a result of Australian union campaigns.

4 weeks annual leave, personal leave, superannuation, workplace safety standards, penalty rates, casual loading, paid parental leave, domestic violence leave and much more are all contributions working people, in their unions, have made to not only their own living standards but also to the living standards of future generations.

Over 60% of Australian workers are covered by conditions negotiated in enterprise agreements and modern awards. Thousands of industrial agreements are negotiated, voted on and agreed without industrial action every year.

Overall, the Australian industrial relations system is functioning very well. This was confirmed recently by the Productivity Commission Draft Report into the Industrial Relations Framework, which states:

*‘Contrary to popular perceptions, Australia’s labour market performance and flexibility is relatively good global standards....strike activity is low, wages are responsive to economic downturns and there are multiple forms of employment arrangements that offer employees and employers flexible options for working’*

It is clear that reality bears no resemblance to the Government’s attempts to create a picture of endemic industrial chaos in Australia that has been caused by unions in general, and by construction unions in the building sector in particular.



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## **2. Governance and Anti-Corruption**

The union movement broadly, through the ACTU, reject any corrupt behaviour. We are committed to the best possible standards of governance. In 2012 the ACTU commissioned a report<sup>1</sup> by former federal court judge Justice Madgwick to improve governance within unions. Since that time, the ETU and other affiliates, have been implementing improved governance practices and systems in line with the recommendations of the Madgwick report, including running approved training for union officials on governance and management practices, with over 5000 union officials/delegates being trained. It has to be said that this was underway well before the government's Heydon royal commission. These actions have delivered results, with the most recent FWC reports show that unions have achieved almost perfect compliance reporting, despite the fact that by international standards unions in Australia currently operate under a higher level of regulation than most corporations.

### Establishment of a National Anti-Corruption Body

Corruption is not acceptable in any part of our society whether it is in politics, business, community organisations, or sport. Unfortunately, despite the existence of laws and standards, corruption still takes place in most large industries, yet there are no plans from the government to single out any other industry buy establishing a specialist investigatory bodies that has broad and practically unfettered powers.

This lays bare the very deliberate and targeted agenda against unions and workers in the construction industry that these Bills give effect to.

Recently on 3 February 2016, the Senator Wang made a speech to the Senate calling for a national integrity or anticorruption agency in Australia.

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<sup>1</sup> <http://www.actu.org.au/our-work/publications/other-publications/governance-panel-report-independent-panel-on-best-practice-for-union-governance>





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In the speech the Senator revealed, worryingly, that Australia's international reputation for being relatively corruption free is waning—dropping from a global ranking of the seventh least corrupt nation 20 years ago to the 13th, ranking behind countries like Canada, New Zealand and Singapore in the Transparency International Australia 2015 corruption perceptions index.

In contrast, Hong Kong has been able to reverse its reputation as a corrupt society by introducing an Independent Commission Against Corruption and is now regarded as one of the most corruption free societies in the world.

Yet here in Australia, while the Turnbull government tries to establish an agency whose purpose is to attack and weaken its political opponents, the government itself is providing the strongest case for the establishment of a national anti-corruption agency through the recent scandals of the former Minister for Human Services and the former Victorian Liberal Party Director.

Stuart Robert, the now disgraced former Minister for Human Services was forced to resign after it was revealed he, in conjunction with a major Liberal party donor, used his Ministerial position and taxpayer funds to further his personal interests – twice. Once in China<sup>2</sup> and once in Australia<sup>3</sup>.

In addition, former Victorian Liberal Party Director Damien Mantach has pleaded guilty to defrauding the Liberal Party of almost \$ 1.5 million<sup>4</sup>.

While we are quick to point out that it is well established that all political parties have these issues, both at a state and federal level, these two examples are particularly pertinent because they are a) recent, and b) relate to the Turnbull Government – who are on one instance trying to justify the legislation currently before the

<sup>2</sup> <http://www.9news.com.au/national/2016/02/12/12/24/stuart-robert-axed-as-minister>

<sup>3</sup> <http://www.abc.net.au/news/2016-02-16/stuart-robert-to-pay-back-1600-spent-on-gold-mine-trip/7174504>

<sup>4</sup> <http://www.theage.com.au/victoria/former-liberal-state-director-damien-mantach-pleads-guilty-to-15m-fraud-20160217-gmw6a8.html>.





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Committee on the basis of widespread corruption and malfeasance in the construction industry, yet will seemingly brush off instances of serious political corruption and fraud.

Such a position is untenable and hypocritical.

This is exactly the kind of behaviour that demands the establishment of a national anti-corruption agency.

We support the establishment of a national anti-corruption agency that has jurisdiction over the public, private and parliamentary sectors.

In fact, at the May 2015 ACTU Congress the entire union movement unanimously supported the establishment of an independent national corruption watch dog to ensure that all Australian institutions, government, corporate, financial, sporting and large membership based were able to be corruption free<sup>5</sup>.

Our commitment to improving governance means we are open to discussions on reporting, transparency, training, conduct of elections and conduct of officials. The appropriate vehicle for consultation on changes to industrial relations is the National Workplace Relations Consultative Committee and the Federal Committee on Industrial Relations neither of which have been presented with a draft bill for consideration by the Turnbull Government.

Any serious attempts to improve governance should include all stakeholders, unions, business representative groups, the government, the opposition and the cross bench, in that way ensuring a genuine set of improvements and avoid any ideological bias.

### **3. Construction Industry Productivity**

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<sup>5</sup> <http://www.actu.org.au/our-work/actu-congress/actu-congress-2015/congress-policy-resolutions/resolutions/national-icac-and-transparency-in-campaign-donations-final-resolution>



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The issue of productivity is often used for political purposes in Australia. Claims of poor productivity performance are used to advance various agendas. It is not surprising that from time to time specific industries are singled out for attention.

The title of the Bills include the words 'improving productivity' and the Government has several times asserted that in the past the operation of the ABCC has led to an improvement in productivity in the construction sector, and it is the fundamental reason that the ABCC should be re-introduced.

'Productivity' refers to the ability to generate outputs from a set of inputs, within the context of the construction sector productivity is meant as an expression of the relationship between labour and other factors against production output. 'Labour productivity' for example refers to the how many units of output we obtain per unit of labour. The absolute magnitude may not always mean terribly much but it does provide economists and policy makers a metric by which to measure the efficiency of sector output.

'Productivity' refers to the degree to which inputs can be turned into outputs. For example labour productivity refers to the units of output per unit of labour. We can talk about improvements in labour productivity if, over time, more output can be obtained from the same labour inputs, or to put it differently, productivity is higher if output per unit of input increases over time.

The Australian construction sector is a large industry accounting for 7.6 per cent of GDP, which increases significantly when overall sales and income associated with the sector is included. Total sales and service income of \$327 billion in 2012-13<sup>6</sup> or some 21 per cent of GDP.<sup>7</sup>

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<sup>6</sup> ABS (2014) *Australian industry, 2012-13*, Cat no 8155.0, 28 May.

<sup>7</sup> GDP from ABS (2013) *Australian System of national accounts, 2012-13*, Cat no 5204.0, 1 November. Note that value added as a share of GDP is a more modest 7.6 per cent of GDP.



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Since 2007 the Australian Bureau of Statistics has provided estimates for simple labour productivity and multifactor productivity.<sup>8</sup> However since the ABS estimates are based on earlier data collections most series go back to at least 1994-95 giving us almost two decades of data. The latest figures cover the period to 2012-13.

Using the ABS data, the value added per worker in construction was \$96,838 in 2012-13.<sup>9</sup> It is useful to compare the figure for construction against other industries in Australia. For this exercise we use the ABS measures which include industries and parts of industries in the market sector. Those calculations are made and presented in the second column of **Error! Reference source not found..** The third column calculates the employment share of the various selected industries.

### Labour Productivity By Industry

	Labour productivity: Value added per worker (\$)	Share of total employment (%)
Mining	602,331	1.79
Electricity, gas, water and waste services	366,414	1.09
Information Media and Telecommunications	209,375	1.58
Rental, hiring and real estate services	155,296	3.72
Transport, postal and warehousing	117,188	5.32
Manufacturing	109,358	8.45

<sup>8</sup> The latest publication in this series is ABS (2013) *Estimates of industry multifactor productivity*, Cat no 5260.0.55.002, 6 December.

<sup>9</sup> ABS (2013) *Australian System of national accounts, 2012-13*, Cat no 5204.0, 1 November.



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Professional, scientific and technical services	108,060	9.09
Wholesale trade	107,687	5.36
<b>Construction</b>	<b>96,838</b>	<b>9.87</b>
Health care and social assistance (private)	64,522	9.44
Public administration and safety (private)	63,444	0.76
Other services	63,426	4.12
Education and training (private)	60,264	3.42
Arts and recreation services	55,960	1.88
Administrative and support services	54,918	8.27
Retail trade	54,868	12.38
Agriculture, forestry and fishing	52,132	4.70
Accommodation and food services	39,298	8.75
<b>Total selected industries</b>	<b>94052</b>	<b>100.00</b>

Source: ABS (2013) *Australian System of national accounts, 2012-13*, Cat no 5204.0, 1 November.

On the ABS data, construction ranks ninth out of 18 industries.

What this indicates is that the construction sector is in fact, performing well with good productivity output, and not a sector that is set by 'lawless' activities and is so beset by inefficiency that there is a dire need for additional laws and regulations to bring it in line with other industries. Industry productivity of the sector improves further when its large size, relative to other sectors, is taken into account.



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Industry averages are artificially inflated by industries such as mining, electricity, gas and water which have high value but low employment (over 8% less than the construction sector). If those high value low employment industries are excluded then the Australian average falls to just \$84,781 which makes construction much more productive than the norm.

The ABS<sup>10</sup> also publishes productivity data for construction and three subsectors; 'building construction', 'heavy and civil engineering construction' and 'construction services', which is listed in the table below.

Labour Productivity by Industry Compared with Construction Sub-industries

	Labour productivity: Value added per worker (\$)
Mining	602,331
Electricity, gas, water and waste services	366,414
Information Media and Telecommunications	209,375
Rental, hiring and real estate services	155,296
Heavy and civil engineering construction	143,684
Transport, postal and warehousing	117,188
Building construction	116,609
Manufacturing	109,358

<sup>10</sup> ABS (2014) *Australian industry, 2012-13*, Cat no 8155.0, 28 May.



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Professional, scientific and technical services	108,060
Wholesale trade	107,687
<b>Construction services</b>	<b>81,179</b>
Health care and social assistance (private)	64,522
Public administration and safety (private)	63,444
Other services	63,426
Education and training (private)	60,264
Arts and recreation services	55,960
Administrative and support services	54,918
Retail trade	54,868
Agriculture, forestry and fishing	52,132
Accommodation and food services	39,298
<b>Total selected industries</b>	<b>94052</b>

Source: ABS (2013) *Australian System of national accounts, 2012-13*, Cat no 5204.0, 1 November.

It is clear that heavy and civil engineering and the building construction sub-industries are very productive compared with the other Australian industries. They have 53 and 24 per cent higher productivity than the Australian average on this measure, even when the outliers such as mining are included in the average.

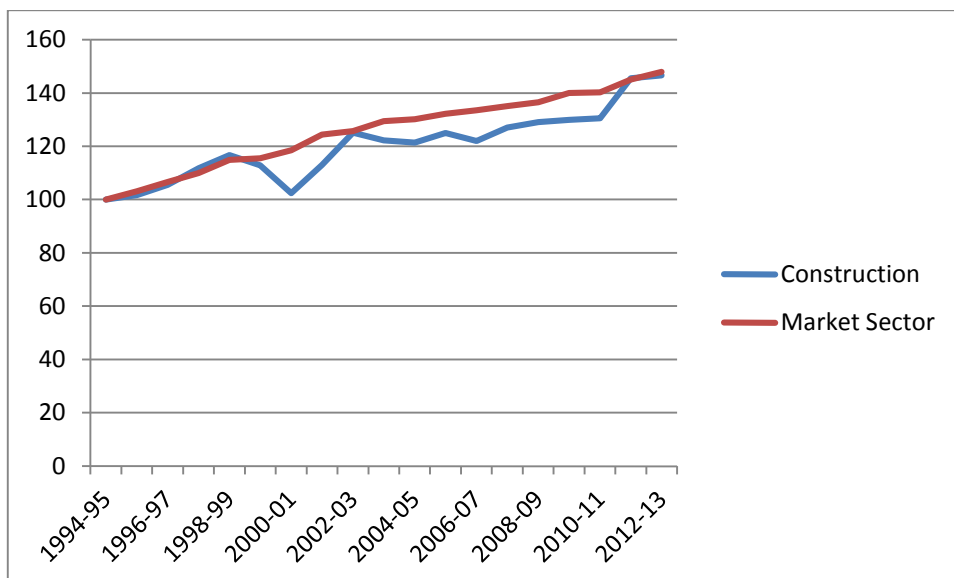


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Productivity growth for the construction also compares favourably when compared to other sectors. ABS data (below) illustrates that the construction sector productivity had grown as much as other sectors up to 2012-13. Note the ABS series 'market sector'<sup>11</sup> includes all those industries the ABS regards as being included in the market sector.

Labour productivity construction industry and market sector



Source: ABS (2014) *Australian industry, 2012-13*, Cat no 8155.0, 28 May.

Labour productivity in construction increased by 47 per cent over the period to 2012-13. Over the same period labour productivity in the market sector as a whole increases by 48 per cent.

<sup>11</sup> The full list goes from 'A Agriculture' to 'S Other services'. Some are sectors with a large publicly-owned component so they are split into public and private and only the private is included in the ABS figures.





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The marked downturn in 2000-01, the ABS makes it clear, was due to a slump in output which in turn was 'due to building activity being brought forward to counter the introduction of the GST'.<sup>12</sup>

The ABS states<sup>13</sup> that:

*'The most comprehensive Australian measure of productivity available is multifactor productivity. It measures the efficiency with which combined labour and capital inputs are transformed into outputs. In the long-term, it represents improvements in ways of doing things (technical progress), which is the primary source of real economic growth and higher living standards. In the short term however, multifactor productivity also reflects unexplained factors such as cyclical variations in labour and capital utilisation, economies of scale, and measurement error.'*

It is clear that construction productivity appears quite superior to the rest of the market sector when it is expressed in terms of multifactor productivity.

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<sup>12</sup> ABS (2007) *Information paper: Experimental estimates of industry multifactor productivity, Australia 2007*, Cat no 5260.0.55.001, 7 September p. 49.

<sup>13</sup>

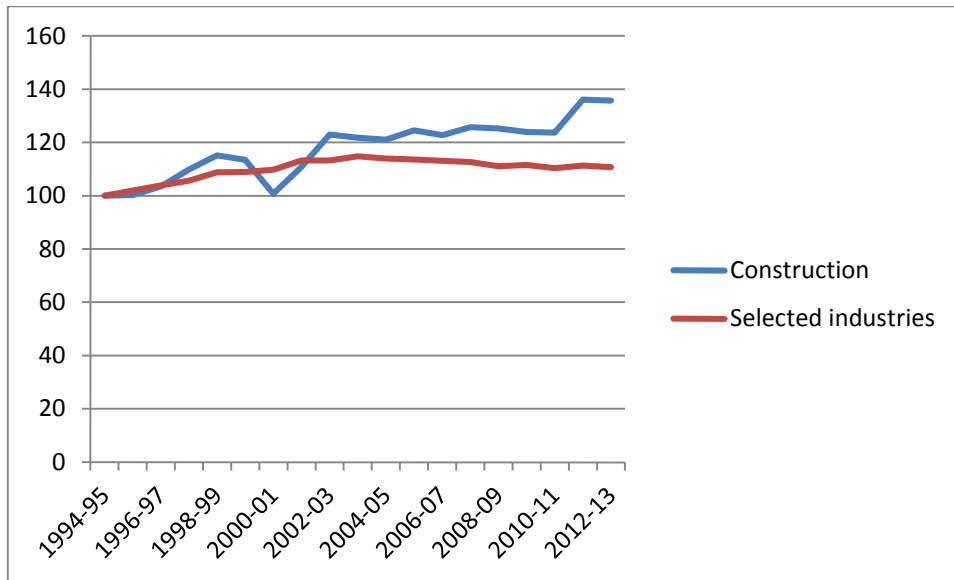
<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1370.0.55.001~2012~Main%20Features~Productivity~20>



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## Multi-factor productivity: Construction industry and market sector



Source: ABS (2013) *Estimates of industry multifactor productivity*, Cat no 5260.0.55.002, 6 December.

Construction productivity ends the period higher by 35.6 per cent compared with only 10.7 per cent for the market sector as a whole. In annual terms the figures average 1.71 per cent productivity growth for construction compared with 0.57 per cent for the market sector as a whole.

Turning to productivity itself we noted that productivity in construction is relatively high with a value added per worker of \$96,838 per annum compared with the Australian industry average of \$94,052. Even then the industry average is biased upward by a couple of very high industries. So productivity is relatively high in construction overall and when we looked at the components of construction it so happens that heavy and civil engineering and the building construction sub-industries are very productive being 53 and 24 per cent higher than the Australian average.

Productivity growth in construction from 1994-95 to 2012-13 was almost exactly the same as the market sector as a whole. However, comparing multifactor productivity



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growth and capital productivity growth we find that construction outperforms the rest of Australian industry by a wide margin. For multifactor productivity, growth is over three higher in construction than the rest of industry.

The high productivity growth in construction is confirmed for the sub-industries over the period since 2007-08. Over that period heavy and civil engineering had a productivity growth of about the industry average of 3.52 per cent while building was a very high 6.38 per cent.

Profitability is also an important and related issue in the productivity debate. In terms of the share of value-added going to profits construction is slightly below average. That is to be expected in an industry that is not very capital intensive compared with the rest of Australian industry. However, when we compare the profitability of construction as a return on capital (gross operating surplus relative to net capital assets) it becomes the most profitable industry of those the ABS allows us to measure. Construction shows an exceptional rate of return of 107 per cent which far exceeds the Australian industry average of 21.8 per cent.

In any objective assessment of the macroeconomic ABS data it is impossible to identify any problem in the Australian construction industry compared with the rest of the market sector in Australia insofar as labour productivity performance is concerned.

## The Discredited Enotech Report

In 2007 the consultancy firm Econtech compiled a report to estimate and quantify the impact of the ABCC. The methodology used by Enotech was based on an existing body of work which compares the costs of specific tasks in the non-unionised residential building industry with the costs of those tasks in the unionised civil construction sector. The assumption is that costs would be higher in civil



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construction because of the union presence, and that the level of unionisation and the regulatory environment could affect the size of the gap.

Econtech argued that if the gap narrowed during the time of operation of the ABCC then it would be because the conduct of unions had been constrained.

This methodology has been criticised on the basis that higher costs in construction could be due to other factors such as complexity, longer time frames and extra safety precautions needed on higher buildings, and that changes in costs could be due to changes in the financing environment. However, it has been fairly widely used and accepted.

The Econtech report said:

*'After averaging 10.7 per cent in the 10 years to the end of 2002, the cost gap has recently closed dramatically to be only 1.7 per cent at 1 January 2007. This is not consistent with claims that the cost gap was due to structural factors. Rather, closing of the cost gap has coincided with the operation of the ABCC and its predecessor the [Building Industry] Taskforce.'*

That is, it suggested that 84 per cent of the gap had been closed. These results were then extrapolated to the wider economy and it was found that:

*'Consumer prices are lower (by 1.2 per cent), and Australian GDP is higher (by 1.5 per cent) than would have been if the ABCC had not existed...the higher construction productivity leads to an increase in consumer living standards...of about \$3.1 billion [a year].'*



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Following its public release, other researchers challenged these findings and tried to—but could not—replicate them using the original data. Eventually Econtech conceded that it had made an error, and that for the original report, some data was “inadvertently juxtaposed in extracting it from...hard copy publications.”

This error had a massive impact on the report findings in that it virtually accounted for all of the difference that had been found between the construction sector as compared to others. As such, the entire report is rendered meaningless.

Justice Wilcox concluded that the Econtech report was deeply flawed and should be disregarded, but he noted that in response to his request for hard evidence as to the impact of the ABCC most submissions merely reproduced this work. It has remained in wide circulation, and indeed Econtech has built on it despite having admitted that it was wrong.

Overall, in any objective analysis, the only conclusion to be drawn is that the construction sector is a productive industry that achieves profitability disproportionate to the capital intensity of the industry. In particular, heavy and civil engineering and building are very productive and have displayed very high productivity growth rates.

Put simply, the construction sector is not broken and it doesn't need fixing.

#### **4. Industrial Disputation and Workplace Relations**

Days lost to industrial disputes per 1,000 workers in the construction industry are shown below, and the data must be very carefully interpreted.



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It demonstrates that there was no dramatic decline from the time when the Building Industry Task Force, which had many of the functions of the ABCC, began operations in 2002. The peaks in the data correspond to serious disputes in Victoria, which were a result of a tightening, not a loosening, of state regulation.

Overall, the changes in frequency for industrial disputes in the construction industry are roughly similar to those for the economy as a whole.

### Working days lost per 1,000 employees, Australia, construction industry



(Source: ABS, Industrial Disputes Australia, Cat. No. 6321.0.55.001)

Even under the same set of regulations and legislation, the amount of disputation can be linked to the level of investigatory activity from the regulator(s). In the case of the ABCC, there has been a significant change in the nature, frequency and scope of the activities undertaken by the Commission under different leadership whilst under a consistent legal and regulatory framework.

In 2010 a new ABC Commissioner, Mr Leigh Johns, was appointed. Soon after taking office, he announced that the ABCC, rather than the Fair Work Ombudsman,



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would pursue breaches such as underpayment of wages in the building and construction industry; and he announced an inquiry into sham contract arrangements in the industry. Use of the coercive powers declined, and there were no compulsory examinations in 2012–13.

In October 2013, Mr Nigel Hadgkiss was appointed as the new Director of the Fair Work Building Industry Inspectorate. Mr Hadgkiss had been deputy director of the ABCC. Mr Hadgkiss told a Senate Estimates Committee in November that he had decided, with the Fair Work Ombudsman, to move the wages and entitlements function back to that agency. He spoke of *'...a return to enforcing the law to its fullest extent. Those who breach the law must face the consequences.'* He is quoted as saying, in a speech to an industrial relations conference, that he would go *'back to the future'* and crack down on lawlessness, intimidation and thuggery on building sites.

It appears that the nature of building industry supervision can change substantially without any change in the legislation.

## 5. Workplace Health and Safety

The construction industry has a number of characteristics that are potential workplace stressors that may affect workplace health and safety, including long hours, tight deadlines, severe financial penalties if targets are not met, non-permanent employment, six day working weeks (sometimes thirteen-day fortnights), early starts, as well as the intrinsic dangers arising from working at heights, and with heavy equipment and electricity. Stress through work and associated work-life interference have been shown to be associated with problems in wellbeing, psychological strain, psychiatric disorders and substance abuse.<sup>4</sup> Thus mental health is a major safety issue in construction. Through much of the 2000s, the age





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standardised suicide rates of male construction workers in New South Wales and Queensland were well above the general population in those states, though finally in 2012, after considerable program activity (the 'MATES' program in Queensland) suicide rates in Queensland construction fell to the state average.

In industries investigated by the Heydon Royal Commission 837 workers were killed between 2009-13. The reintroduction of the ABCC, by making it harder for workers to access help from their union on safety issues, is only going to make this unacceptable situation worse.

While that may initially seem an extreme statement, there is statistical data to support it.

When examining the incidences of injuries and deaths under previous periods of the ABCC operation, it has resulted in an increase in the number of injuries and deaths in the construction industry. Professor David Peetz in his submission to the Senate Standing References Committee on Education and Employment into the Government's approach to re-establishing the ABCC wrote:

*'There were 36 fatalities in the construction industry in 2007-08, twice as many as in 2004-05, immediately before the ABCC commenced operations in late 2005. Under the ABCC, construction became the industry with the highest number of deaths. As observance with occupational safety tends to be lower where unions are weaker, this trend is not surprising.'*

There has been an increase in the rate of deaths in the years of the ABCC, and a reduction since its abolition:



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### Fatality rate, construction and all industries, Australia

Fatality rate (deaths per 100,000 workers)										
Industry of employer	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Construction	5.84	4.50	3.98	5.25	5.36	4.11	4.02	4.33	4.07	3.00
All industries	2.67	2.95	2.57	2.78	2.93	2.57	2.33	1.99	1.94	1.93

(Source – Safework Australia Related Traumatic Injury Fatalities Australia 2013)

It is clear that with the operation of the ABCC comes increased deaths and injuries in the sector. That alone, is enough reason to reject the passage of the ABCC Bills.

## **6. Contraventions of Fundamental Legal Principles**

The Senate Standing Committee for the Scrutiny of Bills has raised a large number of concerns about the ABCC bills infringing on personal rights and liberties. We share all of these concerns as well as others, namely:

Reverse Onus of Proof - There are several instances of reverse onus of proof. For example, action taken by an employee based on health and safety concerns may not be regarded as 'industrial action', but the burden of proof is on the employee to prove that the action was based on the employee's reasonable concern about an imminent risk to his or her health and safety and that he or she did not unreasonably fail to perform other available work<sup>14</sup>. The equivalent provision in the *Fair Work Act* which excludes certain action taken for health and safety reasons from the definition of industrial action (paragraph 19(2)(c) of the *Fair Work Act*) does not reverse the onus of proof. In civil proceedings to do with unlawful picketing<sup>15</sup>, the person has to

<sup>14</sup> ABCC Bill, (paragraph 7(2)(c) and subclause 7(4)).

<sup>15</sup> Ibid, clause 57.



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establish that their actions were not unlawful. Similarly, if a person wishes to rely on an exception or excuse in civil proceedings they bear the burden of proof<sup>16</sup>.

Lack of Warrant Requirements – The Bills<sup>17</sup> provide for authorised officers to enter premises (including residential premises in some cases) without a warrant. In general entry should be by consent or under a warrant. The explanatory materials, and therefore the Government, do not contain a compelling explanation for a departure from this principle.

Penalties – The Bills<sup>18</sup> provide that civil penalties for failure to comply with requests for information do not apply if the person has a reasonable excuse, but that there is no guidance as to what is a reasonable excuse.

Privacy - Examination powers<sup>19</sup> in the bills impinge on the right to privacy, and have the potential to operate retrospectively. but that there is a justification for, and some safeguards around, the use of the power.

Lack of a right to a fair trial - The rules of evidence and procedure for civil matters (and not those for criminal matters) apply in relation to the civil remedy<sup>20</sup> and could breach basic rights associated with a fair trial, but will wait for any views that may be expressed by the Parliamentary Joint Committee on Human Rights.

Broad Powers - The Bills confer broad powers which in some cases are not sufficiently defined. These include the power of the Minister to appoint a Commissioner who has 'suitable qualifications or experience' and is of 'good

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<sup>16</sup> Ibid, clause 93.

<sup>17</sup> Ibid, clause 72.

<sup>18</sup> Ibid, subclauses 76(4), 77(4) and 99(8).

<sup>19</sup> Ibid, clause 61.

<sup>20</sup> Ibid, clause 86.



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character<sup>21</sup> the power of the ABC Commissioner to appoint as a Australian Building and Construction Inspector a 'consultant' who has 'suitable qualifications and experience' to be a consultant; and the similar power of the Federal Safety Commissioner<sup>22</sup>.

Self-Incrimination - The Bills<sup>23</sup> removes the privilege against self-incrimination by providing that a person is not excused from providing information to the ABC Commissioner because to do so would contravene another law or might tend to incriminate or otherwise expose the person to a penalty or other liability.

## 7. Coercive Powers

The coercive powers provisions in the bill will mean that workers in the construction industry will be treated differently under the law to workers in any industry, even though they might be doing the same job. The coercive powers in the bills compel workers in the construction industry to produce information, documents or evidence to an investigation into a suspected contravention of the Fair Work (Building Industry) Act or other building laws and remove the basic right to privilege against self-incrimination. Any person is not excused on the grounds that to do so might tend to incriminate the person or otherwise expose the person to a penalty or other liability.

These are extraordinary powers and it was in acknowledgment of this that there was an expiry on these powers originally. Unfortunately, in our view, these powers have

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<sup>21</sup> Ibid, subclause 21(3)).

<sup>22</sup> Ibid, subclause 68(1)(c)).

<sup>23</sup> Ibid, clause 102.



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been extended. The passage of the current Bills will provide for these extraordinary powers to remain in effect indefinitely.

## Current coercive powers

The FWBC retained the powers originally provided by the *BCII Act* to the then ABCC to require a person to give information, produce documents and attend an interview to answer questions. However, the *FWBI Act* introduced a number of safeguards on the use of the coercive powers. Importantly these include that the FWBC must apply for an examination notice to a Presidential Member of the Administrative Appeals Tribunal (AAT) who must be satisfied that a case has been made out for its use.

The *FWBI Act* also provides that the Commonwealth Ombudsman must be notified whenever an examination notice is issued.<sup>6</sup> Further, the FWBC must provide a report on, and video recording and transcript of, the examination to the Commonwealth Ombudsman, who must then review the examination and provide annual reports to Parliament.

## Proposed coercive powers

The current Bills remove the safeguards that were introduced with the *FWBI Act* re-instates the previous coercive powers of the ABC Commissioner under the *BCII Act* with no safeguards or parliamentary oversight. Where the Commissioner reasonably believes that a person has information or documents relevant to an investigation or is capable of giving evidence relevant to an investigation, Chapter 7, Part 2 of the Bill provides that the Commissioner can require a person to:

- give information or produce documents to the ABC Commissioner;
- attend an examination before the ABC Commissioner; and



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- answer questions or provide information under oath or affirmation.

In addition, where (amongst other reasons) an inspector reasonably believes that the Act, a designated building law or the Building Code is being breached they can:

- enter a premises without force;
- require a person to provide their name and address;
- inspect any work, process or object;
- interview any person;
- require a person to produce a record or document;
- inspect and make copies of records or documents; and
- take samples of any goods or substances.

In addition, outside of the powers related to authorised officers power to enter premises, authorised officers can also issue a notice requiring a person to produce documents or records. In contrast, Federal Safety Officers may only exercise such powers for the purpose of ascertaining if relevant bodies meet and comply with the accreditation requirements, or have complied with the conditions of accreditation in respect of building work.

Unlike the existing Act, the proposed Bills do not require the ABC Commissioner to apply to the AAT for an examination notice. However, the ABC Commissioner must still provide a report on and video recording and transcript of, the examination to the Commonwealth Ombudsman, who must then review the examination and provide annual reports to Parliament.



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## 8. Concluding Remarks

There are some important points to be made about some of the recommendations from the Heydon Royal Commission that have been put forward:

- laws that restrict the ability of workers to access their union are not about governance or productivity.
- laws that punish union organisers for being on site to point out concerns over safety with fines that are larger than fines imposed for safety breaches that can lead to serious injury are not about governance or productivity.
- Setting up an additional body on top of the three existing bodies that regulate unions (The Fair Work Commission, The Fair Work Ombudsman, the Fair Work Building Inspectorate) and ignoring the option to use already existing bodies expertise (such as The Australian Securities and Investment Commission) is not about governance or productivity.
- Singling out construction workers for harsher regulations and penalties while failing to acknowledge that the higher level of safety enforcement from unions is due to the fact it is already one of the most dangerous occupations in the country is not about governance or productivity.
- Limiting the number of officials in a workplace to two even if the worksite stretches for hundreds of kilometres, is across a dozen flights of stairs or has very limited windows of opportunity for the worker to be away from their workstation is not about governance

These bills will not improve productivity in the building industry. However, what the bills will do is slash 76 separate worker protections in the typical construction industry employment contract, increase workplace fatalities and injuries through lower health





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and safety, further reduce already scarce apprenticeship opportunities for young workers and cut wages and conditions.

Australians working in the construction industry will encounter fewer opportunities, will have less job security, fewer workplace protections, and have their basic human and civil rights eroded. Both productivity and workers will suffer under this legislation, which ultimately, will only serve to drive down industry efficiency and living standards.

More than one million Australians who work in the construction industry stand to be treated as second-class citizens under this appalling piece of legislation.

These bills are not in the best interests of the nation. They are part of a politically motivated ideological government agenda against unions.

We urge the Committee to reject these bills.