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Inquiry into the Building and Construction Industry (Improving Productivity) Bill 2013 and a related bill

27 September 2016



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Chamber of Commerce
and Industry



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1 Introduction

On 1 September 2016, the Senate referred the *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013* (Cth) (Building Bills) to the Senate Education and Employment Legislation Committee (Committee) for inquiry and report by 14 October 2016.

The Australian Chamber of Commerce and Industry (Australian Chamber) urges the Parliament to pass the Building Bills as a critical priority. It is clear that the culture of lawlessness in the building and construction industry persists. Industry participants should not have to put up with behaviours in their workplace which, among other things, present a risk to health and safety, discourage and prevent some subcontractors providing services on building sites and undermine principles of freedom of association.

Aside from the direct negative impacts this damaging culture has for industry participants, the industry is a key part of the national economy and Australian taxpayers have a clear interest in ensuring that it operates as efficiently as it can to deliver much needed public infrastructure. It is important that the industry attracts investment to stimulate economic activity and job creation in Australia.

The Building Bills seek to address the culture of lawlessness persisting in the industry by reconstructing key aspects of the regulatory infrastructure established by the *Building and Construction Industry Improvement Act 2005* (Cth) (BCII Act) but repealed by the *Fair Work (Building Industry) Act 2012* (Cth) (FWBI Act). The Building Bills introduce important provisions that will:

- re-establish the Australian Building and Construction Commission (ABCC) to replace the Fair Work Building Industry Inspectorate (also known as Fair Work Building and Construction, FWBC);
- vest in the ABCC strong information gathering powers;
- set the penalties for breaches of civil penalty provisions at a level commensurate with the industry-specific penalties previously applicable under the BCII Act; and
- create a statutory offence for unlawful picketing and a better means of preventing unlawful pickets.

The Heydon Royal Commission into Trade Union Governance and Corruption (2015 Royal Commission) uncovered evidence that it said “*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*”. It arrived at this view despite the challenges it faced in gathering evidence stemming from union behaviour that it said led “*to a prodigious amount of evidence which ranged from being less than frank to being mulishly stubborn to being blatantly mendacious. It also led to the suppression or destruction of documentary records or, extreme tardiness and uncooperativeness in producing them*”.¹

¹ Royal Commission into Trade Union Governance and Corruption 2015, Volume 1, p. 22.

This behaviour in itself serves as a reminder as to why the building industry regulator needs strong information gathering powers so that it may effectively deal with unlawful behaviour.

The 2015 Royal Commission's findings about the culture of the industry are not unique. Multiple previous Royal Commissions and inquiries have also confirmed the existence of a culture of union thuggery, intimidation and lawlessness.

Beyond the findings of these Royal Commissions and inquiries, cases continue to emerge that highlight the destructive industry culture and its negative impacts on building industry participants, including subcontractors and workers. Some recent examples are provided below.

2 Recent examples highlight why industry culture needs to change

Recent cases demonstrate that the toxic culture in the industry persists and is reflected in behaviours that, aside from being flagrantly unlawful, present risks to health and safety, discourage and prevent smaller contractors providing services on building sites and undermine principles of freedom of association. For example, in March 2016 a case came before the court involving a CFMEU official who was found to have entered a site and forcibly removed from a lunch shed the personal property and food, including refrigerated food, belonging to workers (who had subcontracted to do work on a Westfield site in Broadbeach, Queensland). The shed was provided so workers could store their personal property and food and eat their meals however the court found that the union official padlocked the door of the lunch shed so they could not use it saying "sheds on the property were only for the use of union members". The court also found that the union official used foul and aggressive language towards the workers and acted in an angry and abusive manner toward them (see Director of the Fair Work Building Industry Inspectorate v Vink & Anor [2016] FCCA 488 (9 March 2016)).

This behaviour is symptomatic of the "closed shop practices" that see subcontractors and small businesses treated unfavourably or prevented from working on sites because they aren't members of the union or won't accede to the union's preferred arrangements. This type of union intimidation also influences the behaviour and hiring practices of builders in the industry. For example, in August 2016 a builder in Brisbane was fined more than \$25,000 by the court because it found the builder refused to give work to a tiling contractor who didn't have an enterprise agreement that was endorsed by the CFMEU (see Director of the Fair Work Building Industry Inspectorate v J Hutchinson Pty Ltd & Ors [2016] FCCA 2175 (9 August 2016)).

The Australian Chamber urges the Parliament to pass the Building Bills to stand up to unions on behalf of the workers and contractors who are negatively impacted by these behaviours. The Building Bills will strengthen the power of the industry regulator to deal with these behaviours and will increase penalties for wrongdoing which will help to break down the culture that is leading to abuse, intimidation, lost work opportunities and unfairness.

The current framework is clearly ineffective as a deterrent. There is ongoing evidence of the CFMEU continuing its culture of flagrantly breaching the law:

- In August 2016 the CFMEU and five of its officials were fined \$132,000 for right of entry breaches at three construction sites in Adelaide in 2014. When they were asked to leave by the site supervisor because they failed to provide right of entry documentation in accordance with their legal obligations they refused to leave the site. The conduct was described by the judge as demonstrating “**a demoralising lack of respect for either the law or their roles as officials**” (see Director of the Fair Work Building Industry Inspectorate v Bolton (No. 2) [2016] FCA 817 at paragraph 57).
- In July 2016 in Melbourne the CFMEU and six of its officials were fined almost \$180,000 for a three day picket intended to cause significant financial loss for the employer, placing pressure on it to accede to the CFMEU’s claims. The judge said “**the CFMEU’s record of non-compliance with legislation of this kind has now become notorious. That record ought to be an embarrassment to the trade union movement. It has been the subject of comment by this court so frequently in recent times as to make any further recitation quite unnecessary**”. The judge also noted the CFMEU had shown a “**strong disinclination to modify its business model**” to comply with the law. See Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (The Yarra’s Edge Case) [2016] FCA 772 (1 July 2016) at paragraph 48).
- In April 2016 the court imposed fines of more than \$900,000 on the CFMEU and 15 of its officials for coercion and entry breaches at building sites across Adelaide. Some of the activities resulting in this outcome, as found by the court, included:
 - A senior union official removed safety bunting and breached work health and safety rules when he entered an exclusion zone and entered a worker into the exclusion zone;
 - Another union official pushed and shoved a manager to gain access to a site;
 - On one site the CFMEU and 11 of its organisers attempted to coerce a contractor into flying the CFMEU flag;
 - There were multiple breaches of right of entry rules by the union officials. See:
 - Director of the Fair Work Building Industry Inspectorate v O’Connor [2016] FCA 415 (22 April 2016)
 - Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2016] FCA 414 (22 April 2016)
 - Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2016] FCA 413 (22 April 2015)

These behaviours have been occurring across the country and are symptomatic of a serious cultural problem in the building and construction industry that is resulting in:

- disregard for the law;
- unnecessary disruption;
- extreme behaviours on sites that have negative impacts on participants and damage the performance of the industry.

The Building Bills will provide the building industry regulator with enhanced powers to address unlawful behaviour as it arises. This will help culture in the industry shift so that building sites are fairer and more harmonious environments where participants understand that it is not acceptable to break the law or to treat subcontractors unfavourably because they won't accede to union demands.

3 Why does the building industry regulator need stronger information-gathering powers?

The 2015 Royal Commission found that regulators have difficulties obtaining evidence where witnesses are reluctant to speak against parties to illegal conduct because of the risk of retaliation and its finding is not unique. The need for strong information-gathering powers has been revealed by multiple sources:

- The **2015 Royal Commission** (during the course of its Inquiry in 2014 and 2015):
 - found “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”;² and
 - revealed disrespect for the functions of the FWBC, finding that CFMEU officers engaged in aggressive and intimidatory conduct against a number of FWBC Inspectors.³
- An **ABCC Report on the Exercise of Compliance Powers** (2008) found:

*In the absence of the compliance powers many ABCC investigations would be thwarted due to the unwillingness of witnesses to cooperate. The fear of the consequences of being seen to cooperate with the ABCC is evident in parts of the industry. This is to be regretted.*⁴

- The **Wilcox Report** (2006) described the effectiveness of information-gathering powers under the BCII Act, stating

*The ABCC commenced operations on 1 October 2005. Between that date and 3 February 2009, it conducted 128 compulsory interrogations and launched 36 court proceedings seeking the imposition of a civil penalty upon one or more “building industry participants”. Most of the completed proceedings have been successful; many because of information acquired by the ABCC at compulsory interrogations.*⁵

² Royal Commission into Trade Union Governance and Corruption 2014, ‘Interim Report’, p. 1114.

³ Ibid, pp. 1010, 1495.

⁴ Australian Building and Construction Commission, ‘Report on the Exercise of Compliance Powers by the Australian Building and Construction Commission’ (1 October 2005 to 30 September 2008), p. 6.

⁵ The Hon. M. Wilcox QC 2006, p. 1.

- A report of the **Interim Building Industry Taskforce** (2004) formed after the Cole Royal Commission stated:

The Final Report of the Royal Commission cited the possibility of retribution against persons who appeared before the Royal Commission as one of the reasons to establish an interim taskforce. This conclusion proved to be correct as the Taskforce has received information from subcontractors who have not been awarded any contracts since testifying before the Royal Commission. In every instance, it has been expressly indicated by the victim that they have been targeted as a consequence of their involvement with the Royal Commission, effectively being black-banned from the industry.

Unlike the Royal Commission, the Taskforce is unable to require persons to assist with many of its investigations. This severely restricts the ability of the Taskforce to conduct investigations to uncover any such attempts to take revenge upon subcontractors. Likewise, there have been frequent instances where subcontractors will not use the services of the Taskforce because they fear their businesses will be blackbanned.

Disturbingly, similar experiences have been reported across the country. In nearly all circumstances, the fear of losing future contracts overrides the need to support steps to enforce the law.⁶

The Taskforce described its challenges in investigating in the absence of such powers stating:

the Taskforce has investigated over 380 matters in its 17 months of operation. Of this number, the Taskforce has had to finalise approximately 50% of these investigations due to the lack of powers to gather information. These investigations have had to be finalised because witnesses will not make a statement or victims have simply given up...⁷

- The information-gathering powers in the Bill were recommended by the **Cole Royal Commission**. The compulsory nature of the provisions was considered necessary to overcome the culture of silence in the industry, existent in part because witnesses are intimidated or pressured to not cooperate with law-enforcement authorities.

While the FWBI Act retained the compulsory information-gathering powers, it imposed onerous new requirements:

- the director had to apply to an Administrative Appeals Presidential Member to issue an examination notice before requiring a person to give information or attend to answer questions;
- only the director could make such an application; and

⁶ Upholding the Law – One Year On: Findings of the Interim Building Industry Taskforce, 25 March 2004 at <http://fwbc.gov.au/sites/default/files/UpholdingTheLawReport2004.pdf> retrieved 8 April 2015, p. 13.

⁷ Ibid, p. 13.

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

These additional hurdles are unjustified and represent a significant watering down of powers. The Building Bills will remove most of these hurdles, although the additional level of oversight of the examination notice regime will continue under the Building Bills. The Building Bills also require the Commonwealth Ombudsman to review the exercise of the powers in relation to examination notices and provide an annual report to the Parliament about examinations conducted.

The building industry regulator needs strong information gathering powers to be able to do its job effectively and to help protect those providing information used to prosecute third parties from intimidation from those third parties. Compulsory powers are widely used by many other Government agencies, such as the ACCC, APRA, ASIC and the ATO.

4 All Australians are impacted if the taxpayer dollar is not spent efficiently

All Australians have an interest in the efficient operation of the building and construction industry. The public purse is funding over \$125 billion of new infrastructure over a decade through the Government's Infrastructure Growth Package. Infrastructure investment underpins economic growth and has an important part to play in maintaining Australia's living standards. It is critical that taxpayer dollars are spent efficiently so there are adequate funds to ensure hospitals, schools and roads meet the high standard Australians have come to expect.

The construction industry contributes to over 9 per cent of Australian employment so Australians also have an interest in ensuring that it performs well to create new jobs and keep people in work. While taxpayer funds make a significant contribution to infrastructure investment, the private sector should also be engaged in the financing and delivery of infrastructure assets. To ensure this outcome construction firms and projects need to be seen as attractive options for investment. There will be greater incentive to finance and invest in the industry if the lawlessness and associated disruption that negatively impacts project delivery and construction costs is addressed.

The industry's current culture is impeding its performance. The **Productivity Commission**, in its **2014 Public Infrastructure Report** found that:

- *"Tactics, such as delaying, blockading of sites, bullying, verbal abuse and other coercive conduct have been features of interactions on sites. The disruption itself would also lead to project delays and lower productivity on sites";⁸*
- ongoing disruptive tactics that may not be as visible as stoppages and industrial action could still cause highly costly delays including:

⁸ Productivity Commission 2014, *Public Infrastructure*, Inquiry Report No. 71, Canberra, p. 531.

- blocking access to work sites through a range of means, including the dumping of debris or materials at work gates, or parking of machinery or trucks for the same purpose;
 - delaying the delivery or use of materials (including concrete pours), by either preventing access to sites or preventing the further handling of materials once on site;
 - stopping the removal of waste from sites;
 - placing 'bans' on the use of critical equipment, such as cranes;⁹
- disruptive tactics could go on for multiple days or even weeks and this clearly had a negative impact on productivity.¹⁰

Multiple sources suggest a link between the ABCC and enhanced industry performance

- The Final Report of the most recent Royal Commission noted 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'.¹¹
- 2014 research by Independent Economics (formerly Econtech) commissioned by Master Builders Australia confirmed that when the ABCC was in place the legislative reforms and the regulator's effective monitoring and enforcement drove productivity increases in the industry.¹² Regardless of any disagreement regarding research methodology, the unlawful behaviours demonstrated in the building and construction industry clearly leads to productivity loss.
- The 2009 **Wilcox Report**¹³ found that information provided locally in terms of productivity improvements on specific construction projects helped to "throw some light" on productivity improvements that had occurred at the project level¹⁴ since the introduction of the previous building industry reforms. These included:
 - **Grocon**, which told the Wilcox inquiry that "[m]any inefficient practices existed before the establishment of the ABCC as we believe it has not only helped to eliminate those practices and improve productivity and efficiency, but also to an increase in benefits in terms of improved OHS standards ... We believe the ABCC has been instrumental in

⁹ Productivity Commission 2014, p. 532.

¹⁰ Ibid.

¹¹ Final Report, Volume 5, p. 426.

¹² Independent Economics, *Economic Analysis of Building and Construction Industry Productivity: 2014 Update*, prepared for Master Builders Australia, 2 June 2014, p. i.

¹³ On 19 June 2008 the former Government commissioned the Hon Murray Wilcox QC to consult and report on matters related to the creation of a specialist division with the inspectorate of Fair Work Australia with responsibility for the building and construction industry. This reflected the policy position of the Australian Labor Party, at the 2007 federal election. On 3 April 2009 the then Minister released Wilcox's final report, "Transition to Fair Work Australia for the Building and Construction Industry".

¹⁴ The Hon. M. Wilcox QC 2009, 'Transition to Fair Work Australia for the Building and Construction Industry', Commonwealth of Australia, p. 47.

*bringing about compliance to lawful conduct in the building and construction industry”;*¹⁵ and

- **Woodside Energy**, which highlighted the differences between two resource projects: LNG Train 4 (which preceded the ABCC and the BCII Act) and LNG Train 5 (which came after their introduction). . The two projects were compared for their industrial relations records, with both having a similar capital cost, a similar-sized workforce during peak periods, and similar “man” hours worked. On the LNG Train 4 project:
 - The number of “man” hours lost due to industrial action was 254,000 (compared with 27,000 on the LNG Train 5 project);
 - The number of disputes resulting in industrial action was 26 (compared with nine);
 - The number of stoppages of two days or more was 17 (compared with three); and
 - The number of matters subject to federal industrial tribunal applications was 10 (compared with four).¹⁶

Woodside told the Wilcox inquiry that while part of the improved industrial performance could be attributed to “proactive management of workplace relations”, “the most significant contributor to the improvement in behaviour was in Woodside’s view the threat of compliance powers under the BCII Act, the activities of the ABCC and the Code and Guidelines”.¹⁷

Unlawful behaviour on building and construction sites results in heightened risk, anti-competitive practices, unnecessary delays and inefficiencies and undermines investment and the efficient spending of public funds. The building industry regulator should be armed with effective tools to deal with it. It is a near certainty that productivity will improve under a restored ABCC with its full previous powers and resources as proposed by the Building Bills.

5 What did the 2015 Royal Commission find?

The findings of the 2015 Royal Commission are contained within a Final Report and an Interim Report. While described as “Interim” the Royal Commission said that this designation “is to some extent a misnomer” because “every finding contained in the Interim Report was final, unless specifically stated otherwise, or unless sufficient evidence came to light...”

The findings of the Interim Report therefore warrant close attention. The Interim Report suggested that case studies associated with the CFEMU “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

¹⁵ The Hon. M. Wilcox QC 2009, ‘Transition to Fair Work Australia for the Building and Construction Industry’, Commonwealth of Australia p. 48.

¹⁶ The Hon. M. Wilcox QC 2009, ‘Transition to Fair Work Australia for the Building and Construction Industry’, Commonwealth of Australia, p. 48.

¹⁷ The Hon. M. Wilcox QC 2009, ‘Transition to Fair Work Australia for the Building and Construction Industry’, Commonwealth of Australia, p. 49.

at the core of the CFMEU”.¹⁸ 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”¹⁹, 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.*²⁰

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;*
- (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.*²¹

The Final Report of the 2015 Royal Commission 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”.²²

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;

¹⁸ Interim Report, p. 26.

¹⁹ Interim Report, p. 1008.

²⁰ Interim Report, p. 1008.

²¹ Interim Report, p. 1009.

²² Royal Commission into Trade Union Governance and Corruption, Volume 1, p. 12.

- 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.*²³

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.*²⁴

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.

6 The findings of multiple Royal Commissions and inquiries call for industry specific regulation

The 2015 Royal Commission recommended the continuation of an industry-specific regulator but with stronger powers. It recommended that 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. It stated "the powers set out in the Building

²³ Final Report, Volume 5, p. 393.

²⁴ Final Report, Volume 5, p. 401.

and Construction Industry (Improving Productivity) Bill 2013 (Cth) appear appropriate in this regard”.

The findings of the 2015 Royal Commission are not unique. Royal Commissions and inquiries before it also uncovered wilful defiance, disregard or contempt of the law by the CFMEU. The 2015 Royal Commission and Cole Royal Commissions and the Wilcox Report all found that a dedicated, additional level of regulation is required for the building and construction industry.

- The Wilcox Report found that:
 - the ABCC had made a significant contribution to improved conduct and harmony in the building and construction industry;²⁵
 - there was still such a level of industrial unlawfulness in the building and construction industry, especially in Victoria and Western Australia, that it would be inadvisable not to empower the Building and Construction Division to undertake compulsory interrogation;²⁶
 - any tough regulator in the building and construction industry would need a power of coercive interrogation, at least under present conditions;²⁷ and
 - repeated contraventions of the law, even if only industrial law, as distinct from criminal law, may cause considerable disruption to a building project. If the project is sufficiently large or urgent, or the conduct is replicated elsewhere, the breaches may take on national significance.

It is regrettable that despite these findings, the Wilcox Report made recommendations that led to the weakening of the industry regulator’s powers and less effective laws. The result is a return to the type of behaviour that the various Royal Commissions have identified.

- The final report of the Cole Royal Commission stated that its 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”.²⁸ 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;

²⁵ The Hon. Murray Wilcox QC 2009, p. 2.

²⁶ Ibid, p 3 p. 58.

²⁷ Ibid, p. 60. Sort of, the recommendation is on this page

²⁸ 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.

- 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;
- 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.²⁹

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.³⁰

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.³¹

²⁹ 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.

³⁰ 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. 14.

³¹ 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.

- Over ten years earlier, in 1992, 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”.³² 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 so. Those who pay and suffer the other consequences of disruption in the end are the public.*³³

In the future there may no longer be the need for a specialist industry regulator, but it is clear that the culture and behaviours identified by previous Royal Commissions have not been adequately addressed by the current framework and that the ABCC had unfinished business and should not have been abolished. Since the ABCC was abolished 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.

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.

7 The effect of the Building Bills

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

In this regard, the Building Bills would re-establish a specific regulator in the form of the ABCC as well as affecting a number of important reforms to address the behaviours highlighted in the findings of the various Royal Commissions which are inadequately addressed by the current 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’.³⁴

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:

³² 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.

³³ *ibid.*

³⁴ *Building and Construction Industry (Improving Productivity) Bill 2013*, cl. 3(1).

- 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.³⁵

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;³⁶
- introduce stronger laws to address unlawful industrial action and unlawful picketing;³⁷
- 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;³⁸
- 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;³⁹
- 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.⁴⁰

8 The Building Bills will help improve safety

The Building Bills will continue the role of the Federal Safety Commissioner (FSC), who works with industry and government stakeholders to achieve the highest possible work health and safety standards on building and construction projects. The FSC complements Safe Work Australia and state and territory work health and safety regulators in enforcing safety standards on building and construction sites.

Safety improved during the previous incarnation of the ABCC. In its 2014 Public Infrastructure Report, the Productivity Commission found that the fatality incidence rate in 2011-12, after seven years of the ABCC, was less than half that in 2000-01.

³⁵ *Building and Construction Industry (Improving Productivity) Bill 2013* [No 2], cl. 3(2).

³⁶ *Building and Construction Industry (Improving Productivity) Bill 2013* [No 2], cl. 34.

³⁷ *Building and Construction Industry (Improving Productivity) Bill 2013* [No 2], ch. 5.

³⁸ *Building and Construction Industry (Improving Productivity) Bill 2013* [No 2], ch. 6.

³⁹ *Building and Construction Industry (Improving Productivity) Bill 2013* [No 2], 3, ch. 7.

⁴⁰ *Building and Construction Industry (Improving Productivity) Bill 2013* [No 2], ch. 8.

The 2015 Royal Commission found that supposed concern for work health and safety was sometimes used as an excuse for unlawful behaviour. Industrial lawlessness can lead to violence and intimidation, endangering health and safety. The Explanatory Memorandum to the Building Bills cites several examples:

- During the CFMEU/Myer Emporium dispute there was violence in city streets, militant protestors intimidating people and attacks on police horses.
- At the Little Creatures brewery site in Geelong picketers were accused of making throat-cutting gestures, of threatening to stomp heads in, of telling workers they were dead and of shoving, kicking and punching motor vehicles.
- At the City West Water site in Werribee protestors threatened people with “Colombian neckties” (pulling the tongue through a slit in the throat) and the dispute was so heated that workers had to be flown in by helicopter.

These behaviours clearly present risks to health and safety and Building Bills provide enhance mechanisms to address them and change the prevailing culture of the industry to reduce the incidence of unlawful and unsafe activities.

9 The context of this inquiry

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 Committee on Education and Employment Legislation inquiry into the *Building and Construction Industry (Improving Productivity) Bill 2013 [No. 2]* (Cth) in February 2016;
- the Australian Chamber submission to the Senate Standing Committee on Education and Employment Legislation inquiry into the *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) in November 2013;
- 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.

Last year the Building Bills were: introduced into the House of Representatives and negated providing a trigger for a double dissolution election. Prior to the election, the Building Bills were subject to the following Parliamentary scrutiny:

- 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) to the Senate Education and Employment Legislation Committee (Committee) for inquiry and report. A public hearing was held on 4 March 2016 and the Committee reported on 11 March 2016;
- 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 Building Bills enable a stronger response to the unlawful industrial action, picketing, coercion and other behaviour uncovered by multiple royal commissions. Critically, the Building Bills would re-establish the ABCC with powers proven to be effective while in place as well as:

- prohibiting 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;⁴¹
- introducing stronger laws to address unlawful industrial action and unlawful picketing;⁴²
- enabling an inspector or a person affected by a 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 under the amendments proposed;⁴³
- enabling 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.⁴⁴

When 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 specific laws that prescribed higher penalties for breaches, and the narrowing of the circumstances in which industrial action is unlawful. This has resulted in conduct of the nature described earlier in this submission resuming.

⁴¹ Ibid, ch. 6.

⁴² Ibid, ch. 5.

⁴³ Ibid, ch. 8.

⁴⁴ Ibid, cl. 34.



The cultural problem in building and construction results in a growing disregard for the law, important projects costing more and taking longer to complete than they should, threats to the wellbeing of participants, damage to the performance of the industry and discouragement of investment and job-creation.

We saw the benefits to industrial harmony and productivity from a dedicated regulator when the ABCC was in place from 2005 to 2012. Lasting cultural change is difficult and takes time: sadly the ABCC wasn't around long enough to implant a new culture.

A strong and effective legislative framework is required to address unlawful behaviour and change culture. As such, 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.

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 Commission. This submission is made without prejudice to specific interests and views advanced by our members.

10 About the Australian Chamber

10.1 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

10.2 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.

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