Submission to the Education and Employment Legislation Committee

Building & Construction Industry (Improving Productivity) Bill and related Bill

September 2016

AMMA
RESOURCE INDUSTRY EMPLOYER GROUP

AMMA is Australia's national resource industry employer group, a unified voice driving effective workforce outcomes. Having actively served resource employers for more than 97 years, AMMA's membership spans the entire resource industry value chain: exploration, construction, commercial blasting, mining, hydrocarbons, maritime, smelting and refining, transport and energy, as well as suppliers to those industries.

AMMA works to ensure Australia's resource industry is an attractive and competitive place to invest, do business, employ people and contribute to our national wellbeing and living standards.

The resource industry is and will remain a major pillar of the national economy and its success will be critical to what Australia can achieve as a society in the 21st Century and beyond.

The Australian resource industry currently directly generates over 8% of Australia's GDP. In 2014-15, the value of Australian resource exports was $171.9 billion. This is projected to increase to $256 billion in 2019-20. It is forecast that Australian resources will comprise the nation's top three exports by 2018-19. Over 50% of the value of all Australian exports are from the resource industry.

Australia is ranked number one in the world for iron ore, uranium, gold, zinc and nickel reserves, second for copper and bauxite reserves, fifth for thermal coal reserves, sixth for shale oil reserves and seventh for shale gas reserves.

AMMA members across the resource industry are responsible for significant levels of employment in Australia. The resources extraction and services industry directly employs 219,800 people. Adding resource-related construction and manufacturing, the industry directly accounts for four per cent of total employment in Australia.

Considering the significant flow-on benefits of the sector, an estimated 10 per cent of our national workforce, or 1.1 million Australians, is employed as a result of the resource industry.

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EXECUTIVE SUMMARY

- The Building & Construction Industry (Improving Productivity) Bill, and the broader issue of workplace regulation of Australia's building and construction industry, has been subject to repeated previous inquiries:
  - An earlier iteration of this committee inquired into the *Building and Construction Industry (Improving Productivity) Bill 2013* and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013* and reported in February 2016.
  - Earlier, this Committee completed an inquiry into *Building and Construction Industry (Improving Productivity) Bill 2013* and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013* and reported on 2 December 2013.
  - The References Committee inquired into and reported on the "Government's approach to re-establishing the Australian Building and Construction Commission", which reported on 27 March 2014.
  - This Committee also considered and reported on the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2012* that abolished the Australian Building and Construction Commission.
- AMMA made submissions to each of those inquiries, linked to below:
  - AMMA's submission to the 2016 inquiry into the Bills, identical to those again before the Senate (February 2016).
  - AMMA's submission to the 2013 inquiry into the Bills, identical to those again before the Senate (November 2013).
  - AMMA's submission to the 2014 inquiry into the government's approach to restoring the ABCC (January 2014).
  - AMMA's submission supporting retention of the ABCC, and opposing its deliberate watering down by the previous Labor government (January 2012).
- AMMA notes there are no differences between the original Bill that was first inquired into back in 2013 and the current 2016 version. Suffice to say, these issues have been well-aired before Senate committees in the past three years, with this being the third Senate committee inquiry into the specific provisions of the Bill.

Nothing has changed

- Given the inquiries in 2012, 2013, 2014 and 2016 and repeated debate in the Senate, this further inquiry appears unnecessary but is an opportunity for AMMA to again highlight the resource industry's strong support for the Bill.
- While the Bill itself has not changed, nor have the cultures and conduct which require a strong industry regulator. Yet despite numerous attempts by the current and former Coalition governments, the Bill has been rejected in the Senate.
- The problem has been articulated, and a proven solution proposed in legislation. It is now up to the Senate to apply a proven solution to remediate the problems it has been shown; and the urgency of doing so increases daily.
- Since the previous inquiry into the Bill in early 2016, a new report by the Menzies Research Centre, *Constructing a Better Future: Restoring order and competition in the building industry* has been published.
- That report asserts, among other things, that since the Australian Building & Construction Commission (ABCC) was abolished and replaced with Fair Work Building & Construction (FWBC) in June 2012, days lost to industrial action have increased by 34 per cent.
- AMMA commends this report to the committee for further reading as it provides a very useful summary of industrial relations trends and cost increases in the building and construction industry to the present day.
- Also since the previous inquiry into the Bill, AMMA in March and April 2016 conducted the AMMA 2016 Election Survey on policy priorities of the Australian resource industry.
- As part of that survey, 82% of respondents said they "agreed" or "strongly agreed" that the federal parliament should, as a matter of priority, restore the ABCC.

The time for change is now

- AMMA contends now, as it did in earlier submissions in 2009[1], 2012[2], 2013, 2014 and 2016, that the overall effect of the current laws regulating workplace relations in the building and construction industry has been to water down the inspectorate's capacity to ensure that industry participants conduct their activities in accordance with the law.

[1] AMMA submission to the Senate, Education, Employment & Workplace Relations Committee on the Building & Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009, July 2009
[2] AMMA submission to the Senate, Education, Employment & Workplace Relations Committee on the Building & Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011, January 2012

- There remains a culture of unlawfulness in the industry which requires the restoration of the Australian Building & Construction Commission (ABCC) with its full former powers, along with the proposed necessary improvements and modifications.

- As AMMA pointed out in its January 2012 submission, law abiding union officials, employers and workers have nothing to fear from strong laws that protect against intimidation, coercion and thuggery on building and construction sites.

- AMMA therefore welcomes the Bill's proposed reinstatement of former legislative provisions that provide:

  - Higher penalties for unlawful conduct by building industry participants;

  - Stronger prosecutorial powers for the inspectorate and its director;

  - A broader definition of building work;

  - Greater scope for injunctions to stop unlawful industrial action;

  - Stronger anti-coercion provisions;

  - More effective compulsory information gathering powers; and

  - Increased independence of the inspectorate.

- AMMA also welcomes provisions in the Bill that did not exist previously but which provide for:

  - Strict rules around unlawful picketing;

  - Bolstered rules around industrial action that will hold unions more accountable for their members' conduct; and

  - An appropriate reverse onus of proof applied to some coercive and unlawful activities.

Bill retains Fair Work Act's definition of industrial action

- While the vast bulk of the former BCII Act's provisions have been captured in this Bill, one notable exception is the definition of industrial action, which has not been returned to the broader BCII Act definition. Instead, the current Bill (as with previous identical versions) retains the Fair Work Act's definition of industrial action, which is narrower in scope.

- This risks some conduct by unions and union officials not being captured in the proposed legislation as it was by the BCII Act. AMMA would like to see a return to the former BCII Act definition in this Bill.

Reverse onus of proof and vicarious liability welcomed

- AMMA welcomes a reverse onus of proof being applied to those taking industrial action for alleged safety reasons, with the Bill requiring individuals to prove their safety concerns are genuine for such action not to be deemed unlawful.

- AMMA notes the Bill aims to hold union officials vicariously liable for unlawful conduct engaged in by their members and other parties on their behalf and supports that approach.

Extension to offshore construction has strong support

- AMMA addresses the proposed extended geographical application of the Bill to diverse activities offshore later in this submission, suffice to say, this approach has strong support from industry.

The committee's task

- The task now falls to the newly-constituted Senate as a whole, and to this committee in particular, to assure the swift passing of this Bill as a whole. The Senate comes to this task armed with four Committee reports, dozens of submissions, and two Royal Commission reports.

- Senator Cash neatly encapsulated AMMA's concerns in her media statement following the referral of the previous iteration of the Bill to this Committee:

> *"Senate Committees play an important role in considering legislation; however the ABCC Bill is in exactly the same form as it was when it was last introduced in the Senate. As such, it is inexplicable as to what more could be gained by the Senate by subjecting it to yet another Committee process."*[3]

- In AMMA's view, the evidence clearly and consistently favours the restoration of the ABCC. Furthermore, evidence never favoured abolishing the ABCC and replacing it with ineffective, lighter touch enforcement in the first place.

- We firmly believe the 'jury is in' on the need to pass the Bill and restore the ABCC as has been proposed since late 2013.

- Properly considered, and based on evidence such as that provided by the Cole and Heydon Royal Commissions:

  - This Committee should advise the Senate to pass the Bill without amendment.

[3] https://ministers.employment.gov.au/cash/deliberate-delay-vote-abcc-bills

- Senators (Labor, Green and Cross-Bench), who have previously rejected the legislation should support its passage when it next comes before the Senate.

- New Senators looking at this Bill for the first time will hopefully be assisted in their understanding of the implications of the Bill by AMMA's detailed submission.

INTRODUCTION

1. AMMA has been a consistent proponent and supporter of the ABCC since it was first recommended by the Cole Royal Commission in 2003.

2. Resource industry employers strongly opposed the deliberate neutering of the industry watchdog under the previous Labor government and have consistently called for its reinstatement with full former powers, penalties and responsibilities.

3. As AMMA has consistently maintained, a tough cop needs to walk the beat of the Australian building and construction Industry.

4. This is something even the former Labor government recognised when it promised to retain a 'tough cop on the beat' that would focus on 'persistent or pervasive unlawful behaviour'[4], and it is something accepted by both the Cole Royal Commission and the later Wilcox Review.

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

Guiding principles and priorities for employers

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

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

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

9. To ensure this does not continue to happen, the federal parliament must:

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

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

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

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

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

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

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

Examples of continuing misconduct

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

11. This is demonstrated in conduct such as that at Grocon's Myer Emporium construction site in August and September 2012 and on the McNab Avenue construction site in Footscray in August and September 2012.

12. Less than three months after the neutering of the legislation and regulator on 1 June 2012, as clearly foreseen by all but then government and construction unions, there was an inevitable reversion to the conduct which gave rise to the Cole Royal Commission that had been successfully addressed by the ABCC.

13. The FWBC later launched civil proceedings in the Federal Court against the CFMEU and 10 of its officials, alleging coercion over their demands that Grocon employ union-nominated shop stewards at its sites[5]. This followed a blockade at the Melbourne CBD Emporium site. The FWBC alleged the union and its officials forcefully and repeatedly resisted attempts by Victorian Police to gain access to the Myer Emporium site and created an environment that was threatening and

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

intimidating, posing significant safety risks to employees and subcontractors wanting to work on the site.

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

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

16. Examples of recent litigation by the FWBC against construction unions, both pending and finalised, are outlined below:

    a. The FWBC has filed proceedings in the Federal Court against the CFMEU and officer, Andrew Harisiou, for allegedly refusing to allow a worker who was not a member of the CFMEU to work on the Pacific Werribee Shopping Centre site.

    b. The FWBC has commenced proceedings in the Federal Court against the CFMEU and two of its officials to seek injunctions in an effort to put an end to over three weeks of rolling work stoppages at the Carrara Sports and Recreation Project on Queensland's Gold Coast.

    c. The FWBC has commenced proceedings against the NSW branch of the CFMEU and 10 of its officials over allegations of unlawful industrial action orchestrated in support of a CFMEU delegate who allegedly pushed and verbally abused a Lend Lease worker.

    d. The Federal Court has handed down penalties totalling $61,000 against the CFMEU and 29 other respondents including $5,500 against CFMEU WA assistant secretary Joe McDonald over unlawful industrial action at the $208 million Lakeside Joondalup Redevelopment in Perth.

    e. Penalties totalling $94,600 were ordered against the CFMEU, CEPU and three union officials following unlawful industrial action targeted the $45 billion Ichthys LNG development, one of the world's most significant oil and gas projects.

    f. Penalties of $52,000 have been ordered against the CFMEU and one of its officials, Michael Myles, for instigating unlawful industrial action at the $60 million Queensland University of Technology's Kelvin Grove project.

g. The Federal Court handed down penalties totalling $132,000 against the CFMEU and five of its officials for unlawful conduct at three construction sites across Adelaide in 2014.

h. The CFMEU and official, Scott Vink, were dealt maximum penalties of $48,000 and $9,000 respectively by the Federal Circuit Court for an incident that occurred at the Pacific Fair Shopping Centre redevelopment in Qld.

17. In addition to showing the breadth of actionable union conduct on construction sites, the above examples also paint a picture of the low levels of fines that are able to be awarded by the courts, again bolstering arguments for the Bill's proposed increased maximum penalties for unlawful conduct.

18. Addressing union conduct on those projects, AMMA also welcomes the Bill's proposed powers to stop unlawful picketing of building sites. The Bill, if passed, would allow the building industry regulator to seek a court injunction to end pickets like the one organised by the CFMEU at Grocon's Myer Emporium site. The Bill also proposes a new civil penalty for picketing.

19. In AMMA's view, the Fair Work Act's anti-coercion provisions, which have covered building industry participants since 1 June 2012, are also inadequate to deal with conduct such as that displayed on the Grocon sites.

20. AMMA welcomes the return to the BCII Act's broader anti-coercion provisions in this Bill.

The transition from the ABCC to FWBC

21. The former BCII Act operated very effectively in conjunction with the federal WR legislation of the day. Until 30 June 2009, the federal WR legislation was the Workplace Relations Act 1996 which, as AMMA previously pointed out, 'provided the necessary grounding in the building and construction industry for agreement making, union right of entry, pattern bargaining, freedom of association, secret ballots and prohibited content'[6].

22. The WR legislation, now the Fair Work Act 2009, has changed since the inception of the ABCC in 2005, and is expected to remain largely in its current form for the foreseeable future.

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

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

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

b. Stronger prosecutorial powers;

c. A broader definition of industrial action;

d. Greater scope for injunctions to stop unlawful action;

e. Stronger anti-coercion provisions;

f. More effective compulsory information gathering powers; and

g. The inspectorate's high degree of independence from the minister of the day.

24. The BCII Act was complemented by the National Code of Practice for the Building & Construction Industry and its Implementation Guidelines, designed to lift standards in the industry. Together, that suite of tools formed a strong and effective regulatory framework that compelled compliance with the rule of law, and those tools were administered by the ABCC, which was the genuine tough cop the industry needed.

25. As part of the transition to the new regulator on 1 June 2012, the WR legislation specific to the building and construction industry, the BCII Act, was repealed and replaced with the Fair Work (Building Industry) Act 2012. In the move to the new legislative regime, many areas previously regulated by the BCII Act reverted to regulation by the Fair Work Act, while the remaining narrower provisions of the Fair Work (Building Industry) Act were weakened.

26. It remains AMMA's view nearly 15 years after the Cole Royal Commission sat, and more than four years since the ABCC and BCII Act were abolished, that the Fair Work Act does not provide adequate protection against unlawful and inappropriate conduct by building industry participants, yet that is what currently governs important aspects of building industry compliance such as:

a. the definition of industrial action;

b. penalties for unlawful conduct;

c. injunctions against unlawful industrial action; and

d. anti-coercion provisions.

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

28. Those inquiries and evidence of serious transgressions since then as have gone before the courts, continue to give the government the proper basis on which to restore the entire powers of the former ABCC.

THE RESOURCE AND CONSTRUCTION INDUSTRIES

Onshore construction

29. The building and construction industry is of vital importance to the resource industry and the economy at large. It is not just commodity prices, but the costs of construction including labour costs, as well as productivity, that play a key role in determining how much of the investment pipeline will be realised in our resources industry.

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

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

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

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

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

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

Offshore construction

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

37. AMMA notes that the Bill proposes to extend the geographical application of this legislation to diverse activities on offshore hydrocarbons projects. AMMA's full response appears in the separate chapter on Offshore Application, suffice to say that extending the ABCC's enforcement powers to offshore construction have strong industry support.

WHY THE ABCC MUST BE RESTORED

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

39. At some future point, there may no longer be the need for a specialist industry regulator, but that time is not now.

40. As developments in the industry and the recent focus and emphasis of FWBC have demonstrated (*see earlier in this submission for details*), the ABCC remains a desperately needed regulator to address widespread unlawful industrial conduct in the industry.

41. While disappointed this Bill did not pass during the previous session of parliament, AMMA is pleased to see the new government giving effect to its commitment by tabling this Bill in the first week of the new parliament. AMMA hopes once the Bill is enacted, we will see a swift return to the types of economic and productivity benefits achieved under the ABCC.

Productivity improvements due to the ABCC

42. Hard evidence of the ABCC's economic and other benefits to the building and construction industry was cited in the Wilcox report in 2009[7].

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

44. More recently, a 2016 report by the Menzies Research Centre, *Constructing a Better Future: Restoring order and competition in the building industry*, cited evidence that days lost to industrial action have increased by 34% since the ABCC was abolished.

45. A 2009 report by KPMG Econtech, *Economic analysis of building and construction industry productivity* commissioned by Master Builders Australia concluded that not only the legislative reforms themselves but the regulator's effective monitoring

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

and enforcement of them were important in driving productivity increases in the industry that would not otherwise have been achieved.

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

    a. Significantly reduced days lost to industrial action;

    b. Less misuse of safety issues for industrial purposes;

    c. Proper management of inclement weather procedures;

    d. Improved rostering arrangements; and

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

47. Those achievements were said to be due to:

    a. The BCII Act which established various prohibitions;

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

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

AMMA members' experiences

48. Continued feedback from AMMA members is that the ABCC from 2005 to 2012 supported their efforts in the building and construction industry by:

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

    b. Restoring law and order to construction sites;

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

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

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

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

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

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

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

j. Ensuring fairer outcomes to disputes.

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

a. Curbing the unreasonable site activities of militant unions;

b. Reducing the number of costly unlawful strikes;

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

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

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

f. Improving labour productivity.

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

SPECIFIC PROVISIONS OF THE BILL

51. The current iteration of the Building & Construction Industry (Improving Productivity) Bill:

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

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

52. The Bill does contain some specific departures from the previous BCII Act including:

    a. The Bill retains Commonwealth Ombudsman oversight of the exercise of the compulsory information gathering powers although removes the onerous requirement to gain approval from the Administrative Appeals Tribunal before issuing a notice to attend;

    b. The Bill retains and reproduces the Fair Work Act's definition of industrial action, which is narrower (and therefore less effective) than the pre-existing definition under the BCII Act; and

    c. Increasing maximum penalty amounts to reflect changes in the cost of each penalty unit which is now $180 per unit rather than $110, although it retains the same maximum number of penalty units for breaches, being 1,000 for a body corporate and 200 for an individual.

53. The Bill also:

    a. Contains provisions covering unlawful picketing that were not part of the BCII Act;

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

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

54. AMMA makes submissions on some of the specific provisions of the Bill below.

Scope and definitions

Objects of the Act

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

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

Before 1 June 2012 **Building & construction Industry Improvement Act 2005**	**From 1 June 2012** **Fair Work (Building Industry) Act 2012**	**Proposed again in August 2016** **Building & Construction Industry (Improving Productivity) Bill**
The main object of this Act is to provide an improved workplace relations framework for building work to ensure that building work is carried out fairly, efficiently and productively for the benefit of all building industry participants and for the benefit of the Australian economy as a whole. This Act aims to achieve its main object by the following means:	The object of this Act is to provide a balanced framework for co-operative, productive and harmonious workplace relations in the building industry by:	The main object of this Act is to provide an improved workplace relations framework for building work to ensure that building work is carried out fairly, efficiently and productively for the benefit of all building industry participants and for the benefit of the Australian economy as a whole. This Act aims to achieve its main object by the following means:
Improving the bargaining framework so as to further encourage genuine bargaining at the workplace level		Improving the bargaining framework so as to further encourage genuine bargaining at the workplace level
Promoting respect for the rule of law	Ensuring compliance with workplace relations laws by all industry participants	Promoting respect for the rule of law
Ensuring respect for the rights of building industry participants		Ensuring respect for the rights of building industry participants
Ensuring that building industry participants are accountable for their unlawful conduct		Ensuring that building industry participants are accountable for their unlawful conduct
Providing effective means for investigation and enforcement of relevant laws	Providing an effective means of enforcing those rights and obligations Providing appropriate safeguards on the use of enforcement and investigative powers	Providing effective means for investigating and enforcing this Act, designated building laws (to the extent that those laws relate to building work) and the Building Code

Before 1 June 2012 Building & construction Industry Improvement Act 2005	From 1 June 2012 Fair Work (Building Industry) Act 2012	Proposed again in August 2016 Building & Construction Industry (Improving Productivity) Bill
Improving occupational health and safety in building work	Improving the level of occupational health and safety in the building industry	Improving work health and safety in building work
Encouraging the pursuit of high levels of employment in the building industry		Encouraging the pursuit of high levels of employment in the building industry
Providing assistance and advice to building industry participants in connection with their rights and obligations under relevant industrial laws	Providing information, advice and assistance to all building industry participants about their rights and obligations	Providing assistance and advice to building industry participants in connection with their rights and obligations under this Act, designated building laws and the Building Code

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

58. AMMA supports the Bill's restored means for achieving the objects of the proposed legislation which will encourage:

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

    b. accountability for unlawful behaviour; and

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

Definition of building work

59. Section 6 of the Bill sets the scope of the restored ABCC by defining 'building work'.

60. Aside from the offshore application of the Bill (discussed later), s6 of the Bill returns to the BCII Act's definition (s5 of the BCII Act).

61. In particular, the Bill would restore the BCII Act's inclusion of pre-fabrication work whether carried out onsite or offsite in the definition of 'building work'. The currently operating Act includes only onsite prefabrication work in its definition of 'building work' at s5.

62. The Bill also adds a new area of coverage into the definition of building work – transporting or supplying goods to be used in construction work covered under

the definition of building work transporting directly to building sites, including any resources platform.

Industrial action and unlawful conduct

Bill's definition of industrial action should be broader

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

64. Section 36 of the BCII Act previously cast a wide net whereas s19 of the Fair Work Act restricts the meaning of industrial action to conduct by employees and employers only and does not extend the definition to union conduct as the BCII Act did.

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

66. AMMA is somewhat disappointed that s7 of the Bill for the most part simply reproduces the definition of industrial action included in the current s19 of the Fair Work Act.

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

68. The trouble is that the current application of the Fair Work Act in the area of industrial action is inadequate and based on erroneous assumptions by the Hon Murray Wilcox QC in his final report in 2009:

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

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

69. As AMMA previously pointed out[8], Wilcox's assumption is incorrect given that:

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

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

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

71. This broader definition is necessary and of practical significance to efforts to address persistent and pervasive unlawful behaviour in the industry. AMMA recommends amending the Bill to ensure that happens.

72. AMMA also notes the new vicarious liability provisions at s94 of the Bill which aim to hold unions accountable for employees' conduct such as industrial action. AMMA is supportive of those provisions.

Injunctions to stop unlawful action

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

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

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

76. AMMA welcomes s48 of the current Bill allowing injunctions to be granted if a court believes unlawful industrial action is 'occurring' as well as being 'threatened,

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

impending or probable' or 'being organised', thus restoring the full suite of injunctions to curtail this type of unlawful behaviour.

Unlawful picketing

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

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

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

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

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

82. Another example of such pickets, whilst not specific to the building industry, is the picketing in 2013 of cruise ship the Spirit of Tasmania in furtherance of an industrial relations claim which caused considerable harm to businesses and the wider Tasmanian community.

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

84. Resource industry employers view this area as follows:

    a. If Parliament or our courts choose to make particular picketing action illegal or actionable, the picketing or action should be illegal or

actionable regardless of who is ultimately organised to stand the picket line.

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

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

Social media

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

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

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

Links to organised crime

88. Upon an earlier identical version of this Bill being tabled in federal parliament, the CFMEU fired the first public shot linking building industry industrial relations to organised crime as follows:

> *Support for such extreme laws is couched in terms of the industry being unlawful. The ABCC cheer squads mutter darkly of union connections with organised crime and bikie gangs, citing sensationalist media coverage. What they never do is explain how industrial laws could cure criminality,*

even were criminality found to be endemic in the industry (a contention that doesn't stand up to scrutiny in any event).[9]

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

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

Bullying

91. The Fair Work Act's anti-bullying provisions commenced on 1 January 2014.

92. Resource industry employers have been at the forefront of arguing that all workplace bullying should be subject to appropriate sanctions, including that engaged in by union officials, members and their supporters. This type of bullying conduct might be used against, for example, employees who choose not to join or associate with a trade union or, of relevance to this current Bill, persons choosing to cross a picket line. Several recent cases point to bullying behaviour in that type of context.

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

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

95. Section 47(2)(iii) of the Bill is a measure to address intimidation and restrictions on the exercise of lawful rights and as such is supported by AMMA and its members.

What about rights to protest?

96. Community expectations on rights to protest may be raised with or by the Committee in considering this Bill.

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

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

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

    a. Purely environmental or political protests;

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

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

Payments for industrial action

99. Payments during periods of industrial action were enlivened for the resource industry following the High Court's July 2013 decision in Mammoet[10].

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

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

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

Anti-coercion provisions

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

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

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

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

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

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

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

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

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

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

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

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

onus of proof applies here which did not exist under the BCII Act, also supported by AMMA.

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

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

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

Maximum penalties

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

115. Maximum penalties per breach were consequently reduced by two-thirds as of 1 June 2012, from $22,000 to $6,600 per breach for individuals and from $110,000 to $33,000 per breach for corporations including unions. Currently those penalties are $10,800 for individuals and $54,000 for corporations (based on each penalty unit being $180).

116. The deterrent value of such penalties compared with the previous regime has been massively reduced. As one respondent to a 2013 AMMA survey said:

> *"Individuals breaching these provisions are more inclined to do so because the penalties have been watered down. There have been some instances of brazen breaches of workplace law which may not be found so because of the diluted strength of the law."*[11]

117. The fact is the previously higher penalties in the BCII Act more appropriately reflect the considerable financial consequences of unlawful conduct by building industry

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

participants. Those financial consequences are magnified by the fact that construction projects invariably involve multi-million or billion-dollar investments. A failure to meet contractual requirements can incur significant liquidated damages.

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

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

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

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

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

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

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

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

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

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

    f. Extension of time claims by contractors; and

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

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

121. AMMA is pleased to see a return in the current Bill to the same level of penalty units per breach as applied under the BCII Act for Grade A and Grade B civil penalty offences. With the rise in each penalty unit from $110 at the time the BCII Act was enacted to $180 currently, maximum Grade A civil penalties will return to $180,000 for bodies corporate and $36,000 for individuals under the Bill. For Grade

B civil penalties, the Bill will return maximum penalties to $18,000 for bodies corporate and $3,600 for individuals.

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

Powers and functions of the commissioner

Prosecutorial / intervention powers

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

124. This remains the case today, particularly so for the subsequent removal of the regulator's power to prosecute where other parties to a matter have settled.

125. By way of example, in 2009, the ABCC effectively launched legal proceedings against 1,300 unionists who took unlawful industrial action against contractors on the Pluto project. Without the ABCC and the capacity to prosecute, the militant individuals behind such disregard for fellow working Australians would never be held to account for their actions.

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

127. Put simply, if a business has suffered so much commercial damage that it must give in to unions' demands to settle, the building industry watchdog is also prevented from continuing legal proceedings or bringing its own separate proceedings against a union and/or employees for the damage caused during an illegal dispute.

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

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

Powers to obtain information

130. Formerly, the ABCC stated that its compliance powers were critical to the success of its court proceedings[12]. That position was supported by the Wilcox report in 2009.

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

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

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

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

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

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

134. AMMA is pleased to note that legislation took effect in mid-2015 extending the operation of the current compulsory powers for a further two years – until 1 June 2017 – even in their current watered down form.

135. The Construction Industry Amendment (Protecting Witnesses) Act 2015 took effect on 1 June 2015 in extending the duration of operation of the compulsory interview powers, which had been due to "sunset" or expire on that date.

136. The legislation amended the Fair Work (Building Industry) Act 2012 to extend for two years the period during which the director of FWBC can apply to a nominated Administrative Appeals Tribunal presidential member for an examination notice.

137. That power, under the current s.45 of the Fair Work (Building Industry) Act 2012, will now operate until 1 June 2017, by which time AMMA hopes the current Bill has passed into law.

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

138. The proposed automatic repeal of the compulsory information gathering powers without any requirement that the necessary cultural change be achieved would have been a disastrous move and AMMA welcomes the extension of those powers, noting the current Bill does not provide for future sunsetting of those powers.

139. In AMMA's view, the compulsory information gathering powers are a key element of the regulatory regime in the building and construction industry and have been widely acknowledged as a necessary tool for identifying unlawful conduct and holding those responsible to account.

140. In relation to the current powers, with the current head of the FWBC (Nigel Hadgkiss) taking a more proactive approach to enforcement and the use of those powers, the onerous pre-conditions placed on the use of them is likely slowing down investigations. The numerous steps required for the director to be granted an examination notice are highly bureaucratic and administrative.

141. The Cole Royal Commission identified an embedded culture of silence in the building industry where workers were commonly advised to refuse to speak with inspectors carrying out investigations and were told instead to contact their union and 'sit in sheds whenever an inspector was onsite'[13].

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

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

The independent assessor

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

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

146. Removing the inspectorate's ability to compulsorily acquire information altogether on certain projects upon application by an interested person

[13] AMMA, Building industry regulator: a tough cop or a transition to a toothless tiger? 2008, AMMA, 11

(including a union official) was a further retrograde step and AMMA welcomes its repeal in the current Bill.

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

Ministerial directions

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

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

150. An example of how ministerial directions could be misused was the 17 June 2009 attempt by the then WR Minister to direct the ABCC in how it should use its compulsory information gathering powers[14]. Interference of this type risks undermining the independence of the inspectorate and the public's confidence in it.

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

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

153. The Bill would return the ministerial powers to what they were under the BCII Act, affording the regulator the requisite independence from government.

Vicarious liability

154. Section 94 of the Bill states that any conduct engaged in on behalf of a body corporate (ie a union) by an officer, employee or official of that union or by any

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

other person at the direction of an officer of the union, is taken to have been engaged in by the union itself.

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

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

157. AMMA supports those provisions as an unfortunately necessary method of holding trade unions properly accountable for inciting other parties to take action on their behalf.

Reverse onus of proof

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

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

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

OFFSHORE APPLICATION

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

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

163. It is important to ensure the rule of law is observed on offshore oil and gas projects such as the proposed Browse FLNG project, which is currently at the feasibility stage. That project, which has a capital expenditure of around $10 billion and is expected to start up in the Browse Basin after 2020, must have full protections against unlawful behaviour in the construction phase.

164. Additionally, all employees deserve to go to work each day without the fear of being harassed, intimidated or the subject of violence.

165. In a maritime environment, the safety and wellbeing of workers is the paramount consideration of employers. However, the offshore construction environment is complex. The scale of engineering is immense and problems raised by the operation of vessels in the maritime environment require specialist solutions.

166. Accordingly, construction activities undertaken are extremely specialised in nature and employers strive always to maximise work health and safety.

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

168. The regulatory frameworks applying to offshore hydrocarbons[15] are highly complex and overlapping. Federal laws must be complied with at the same time as international legal obligations and, when relevant, state and territory legislation.

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

[15] Extending well beyond employment law / legislation.

170. AMMA members support the inclusion of all (or as much as possible) onshore and offshore construction-related work being regulated by the ABCC and the BCIIP Act when it comes law.

171. AMMA appreciates the proposed extension contained in the Bill and the efforts to draft the provisions in a changing environment not only regarding maritime technologies, but also within a fluid legal environment, with the *Pocomwell* decision handed down as the original Bill's provisions were being drafted.

172. As a proponent and supporter of those changes, and as the industry "on the water" operating the particular technologies and processes to be covered, AMMA sees it as our responsibility to have reviewed the Bill as drafted against rapidly changing and wide-ranging industry practices and requirements offshore.

173. It is important that we equip the government in seeking to act on industry concerns with the best possible feedback from the industry on how to deliver the outcomes we seek most effectively, and avoid any future problems in implementation.

174. AMMA members have asked that this submission draw four matters to the attention of the committee:

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

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

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

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

175. AMMA's 2013 submission to an earlier Senate inquiry on an identical Bill canvasses these issues in greater detail.

176. AMMA would be happy to provide more detail to the committee on any aspects of this submission.