HOUSING INDUSTRY ASSOCIATION

Submission to the
Senate Education and Employment Legislation Committee

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

27 September 2016

HOUSING INDUSTRY ASSOCIATION

contents

Housing Industry Association contact:

David Humphrey
Senior Executive Director
Business, Compliance & Contracting
Housing Industry Association
79 Constitution Ave,
Campbell ACT 2612
Phone: 02 6245 1300

ABOUT THE HOUSING INDUSTRY ASSOCIATION

The Housing Industry Association (HIA) is Australia's only national industry association representing the interests of the residential building industry, including new home builders, renovators, trade contractors, land developers, related building professionals, and suppliers and manufacturers of building products.

As the voice of the industry, HIA represents some 40,000 member businesses throughout Australia. The residential building industry includes land development, detached home construction, home renovations, low/medium-density housing, high-rise apartment buildings and building product manufacturing.

HIA members comprise a diversity of residential builders, including the Housing 100 volume builders, small to medium builders and renovators, residential developers, trade contractors, major building product manufacturers and suppliers and consultants to the industry. HIA members construct over 85 per cent of the nation's new housing stock.

HIA exists to service the businesses it represents, lobby for the best possible business environment for the building industry and to encourage a responsible and quality driven, affordable residential building development industry. HIA's mission is to:

> *"promote policies and provide services which enhance our members' business practices, products and profitability, consistent with the highest standards of professional and commercial conduct."*

The residential building industry is one of Australia's most dynamic, innovative and efficient service industries and is a key driver of the Australian economy. The residential building industry has a wide reach into manufacturing, supply, and retail sectors.

The aggregate residential industry contribution to the Australian economy is over $150 billion per annum, with over one million employees in building and construction, tens of thousands of small businesses, and over 200,000 sub-contractors reliant on the industry for their livelihood.

HIA develops and advocates policy on behalf of members to further advance new home building and renovating, enabling members to provide affordable and appropriate housing to the growing Australian population. New policy is generated through a grassroots process that starts with local and regional member committees before progressing to the Association's National Policy Congress by which time it has passed through almost 1,000 sets of hands.

Policy development is supported by an ongoing process of collecting and analysing data, forecasting, and providing industry data and insights for members, the general public and on a contract basis.

The Association operates offices in 23 centres around the nation providing a wide range of advocacy and business support.

1. EXECUTIVE SUMMARY

HIA welcomes the opportunity to make submissions to the Education and Employment Legislation Committee's inquiry into the *Building and Construction Industry (Improving Productivity) Bill 2013* (**Bill**) and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013* (**Transitional Bill**).

Giving effect to the Federal Government's long standing commitment to re-establish the Australian Building and Construction Commission (**ABCC**), the Bills were the main triggers for July's double-dissolution election.

In HIA's view, this reflects how essential the passage of the legislation is for both the construction industry and the broader Australian economy.

As one of the bases on which a double dissolution election was called, arguably the Government has a clear mandate to have these laws passed through Parliament.

But there are also a number of substantive reasons why the ABCC and the industry specific suite of penalties should be reinstated. The most important of these is the restoration of the rule of law to the building and construction industry.

The rule of law is a fundamental ideological principle of Australia's democracy. At its core is the idea that no one is above the law.

In the past 15 years, 2 Royal Commissions - the 2002 Cole Royal Commission and the 2015 Heydon Royal Commission – together with many other reports, investigations and inquiries have catalogued lawlessness and illegal conduct throughout the commercial building industry.

For the most part, the detached housing sector been virtually free of large scale industrial disruption and disputes, regrettably this is not the case in all areas of the industry. Some industrial organisations and participants appear to hold the view that when the law does not suit they can use lawless methods to attain their economic, industrial and political ends.

Examples of these methods include coercive pattern bargaining, the use of intimidation and stand-over tactics against independent contractors and non-unionised businesses and the black-banning of certain building product suppliers and manufacturers who choose to supply to customers out of favour with the CFMEU.

Fortunately a strong and effective regulatory agency with specific penalties and powers has previously been shown to work to deter this type of unlawful behaviour.

When the ABCC began in 2005, the number of working days lost to industrial disputes in the construction industry annually per 1000 employees fell from 224 in 2004 to just 24 in 2006.

However since the ABCC was abolished by the then Labor Government in 2012, industrial disputes have again risen. Further, since the abolition of loss the ABCC, union officials have received more than $3 million in fines, even accounting for the significant reduction in penalties enabled to be imposed. A significant number of cases remain before the courts.

As Commissioner Heydon has stated:

'Unless and until there is a strong regulator enforcing legislation that actually deters people from repeatedly breaking the law, the culture in the industry will not change. The current laws have simply been insufficient.'

Further, this type of behaviour is not victimless.

Small business and independent subcontractors are the backbone of an efficient and productive construction industry. However intimidation and bullying tactics deny many businesses that do not have enterprise bargaining agreements (EBAs) with the CFMEU or other construction unions the opportunity to work on large scale commercial (including medium density apartment) and public works projects.

As detailed by Independent Economics in 2013, during the FWBC era there have been significant losses in productivity. Consumers have been $5.5 billion worse off, with higher construction costs reducing demand for new construction including a 1.1% fall for residential construction.[1]

On the other hand, even though detached housing is not within the proposed jurisdiction of the ABCC, the residential building sector as a whole will experience a productivity gain of 1.5% if the ABCC is reinstated.

2. HIA'S SUBMISSIONS TO THE INQUIRY

In responding to this Inquiry, HIA notes that both Bills have already undergone significant parliamentary scrutiny with 3 Senate inquiries during the last term of Parliament, most recently in February 2016.

The competing views of industry and small businesses supporting the Bill and unions opposing are generally well known.

To this extent, HIA repeats and relies on the submissions it provided the Senate in February 2016. A copy of those submissions is **annexed** as "A" and considers in greater detail the substantive content of the proposed legislation.

HIA would however like draw the Committee to the following specific matters in these submissions:

- A general comment on the need for separate industry laws and regulation;
- ABC's Fact Checking Site debunking of union claims.

3. THE NEED FOR A SEPARATE INDUSTRY LAWS AND REGULATION

HIA notes that some commentators have suggested that rather than bringing back the ABCC, instead a "general corruption watchdog" or a national version of the NSW Independent Commission Against Corruption (ICAC) should be established.

HIA does not share this view.

---

1 [1] See http://www.masterbuilders.com.au/InformationSheets/kpmg-econtech-economic-analysis.

Whatever the merits of a federal corruption commission may be, issues of "corruption" are quite separate and distinct from the issues and problems addressed in the ABCC Bills.

These Bills are targeted at unlawful industrial conduct and behaviour.

In HIA's view, the findings and serious body of evidence presented before the Heydon Royal Commission, the 2002 Cole Royal Commission, the number of cases currently before the Fair Work Commission and Federal Court and the activities of the FWBC demonstrate the need for building industry specific laws.

To quote Commissioner Heydon:

> *'the argument that there is no need for an industry specific regulator cannot be sustained.'*[2]

As identified in its final report the *'systemic corruption and unlawful conduct'*[3] of the CFMEU is not new; over the last 40 years a number Royal Commissions have reported the same.

There is, according to Commission Heydon:

> *'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 the CFMEU officials habitually show contempt for the rule of law.'*[4]

The Director of the FWBC has also observed:

> *'that the Rule of Law is severely lacking in the industry…the agency is doing all it can within its jurisdiction and means to curb that lawlessness…*
>
> *Australia's building and construction industry employs one in nine of all workers. That figure is more than one million people. In addition to this, the industry is the nation's third largest contributor to gross domestic product. To my mind, there can be no doubt it is an industry where we must ensure that law and order prevails.*[5]

In May this year the Director noted that of the 60 cases before the courts 52 of them involve the CFMEU citing that more than 100 individual CFMEU officers were before the court for more than 1,100 alleged breaches of the Fair Work Act.[6]

The 2014-15 Annual Report cites that during that period, FWBC investigated 948 contraventions of workplace laws with right of entry contraventions representing the largest portion of matters at 40%, and freedom of association, unlawful industrial action and coercion making up the other significant areas of investigation.[7]

---

[2] Chapter 8 at paragraph 97
[3] Chapter 8 at paragraph 1
[4] Chapter 8 at paragraph 23
[5] FWBC Annual Report 2014-15 pg.14
[6] Speech https://www.fwbc.gov.au/news-and-media/latest-news-and-media/speech-aig-conference

[7] https://www.fwbc.gov.au/about/accountability-and-reporting/fwbc-annual-report-2014-15/fwbc-investigations

The number of FWBC proceedings has doubled since the 2013-14 period sitting at a total of 36 during 2014 to 15. That period also marked the fourth occasion that penalties have exceeded the $1 million mark in the history of FWBC and its predecessor agencies.

Consistent with previous assessments of the activities of the FWBC coercion and right of entry attracted the highest amounts of penalties. Coercion penalties rose 64% compared to those in 2013 to 14, and penalties for right of entry increased nearly tenfold.[8]

In a recent Federal Court judgment, Justice Tracey referred to the *union's 'propensity to deliberately flout industrial legislation which proscribes coercive conduct'*:

> *'[The cases] bespeak a deplorable attitude, on the part of the CFMEU, to its legal obligations and the statutory processes which govern relations between unions and employers in this country.'*[9]

The conduct of the unions in creating a closed shop culture was aptly expressed by Justice Vasta, who observed that in a case where adverse action was found to have been taken against a subcontractor by a principle contractor on the basis that the subcontractor did not have a union endorsed Enterprise Agreement:

> *'Such conduct strikes at the heart of freedom of association. For subcontractors, such as C&K, a major pathway to growing the business is to be awarded contracts for large construction companies….if the only wat they can break into those circles is to have made an agreement with the CFMEU, then the whole fabric of our industrial relations system will disintegrate.'*[10]

Whilst the Heydon Royal Commission puts forward a number of recommendations to address such behavior, its cornerstone recommendation is the establishment of a separate, building and construction industry specific regulator.

Industry specific penalties

The restoration of the ABCC as a standalone regulator goes 'hand in glove" with the construction industry offence regime in Chapter 5 of the Bill.

Against a legislative backdrop that include enhanced bargaining rights and the removal of many of the restrictions on prohibited content that were included in the *Workplace Relations Act,* it is even more important that construction industry-specific prohibitions on unlawful industrial action be included.

As they did under the *Building and Construction Industry Improvement Act 2005*, strong penalties will act as a strong incentive to all participants – employers, employees and unions - to adhere to the industrial relations laws.

Under the Bill a person will be apply for injunctive relief to restrain a person from organising or engaging in unlawful industrial action that relates to building work, whilst penalties will be increased to

[8] https://www.fwbc.gov.au/about/accountability-and-reporting/fwbc-annual-report-2014-15/penalty-proceedings
[9] See *Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1213 (11 November 2015)
[10] *Director Fair Work Building Inspectorate v J Hutchinsons Pty Ltd & Ors* [2016] FCCA 2175 (9 August 2016) at paragraph 26

a maximum of $34,000 for individuals and $170,000 for unions/ companies for breaches of these provisions.

In this regard, the construction industry is inherently exposed to pattern bargaining and industrial action over disputed terms, such as those that seek to limit the engagement of independent contractors.

True enterprise bargaining requires the direct input of those whose interests are most directly affected by its outcomes – workers and their employer. The circumstances of individual businesses will differ.

In 2003, Commissioner Cole succinctly identified the significant arguments against pattern bargaining:

> *Firstly, it is, by its nature, imposed compulsorily. Inherent in pattern bargaining is the notion that neither the employer nor the employees have input into the essential terms of the agreement covering their employment relationship. That is decided by others, usually the union, head contractors or employer associations. It is no answer to say that such an agreement can only be registered once it is approved by the employer and a majority of its employees. In truth, they have no option, for without a union-endorsed EBA, it is virtually impossible to obtain work on major sites in the CBD and major centres around Australia. Freedom of bargaining is non-existent.*
>
> *Second, it denies to the employers the capacity for flexibility, innovation and competitiveness in a major aspect of contract cost. In economic terms, it is inefficient.*
>
> *Third, it denies to the employees the capacity to determine their own employment conditions including those relating to annual leave, hours of work, productivity bonuses and general flexibility.*
>
> *Fourth, it assumes that all businesses and their employees in a given sector operate in the same fashion, have the same objectives, adopt common attitudes and approaches to working arrangements and are content with uniformity with the rest of the industry. There is no basis for that assumption.*
>
> *Fifth, it denies the close relationship which exists in small business arrangements between an employer and a small number of employees. It assumes that third parties understand better than either the employer or the employees what the business model of the business is and what the wishes and desires of employees are. There is no basis for that assumption.*
>
> *Sixth, it assumes that employees are not capable of negotiating satisfactorily on their own behalf.*

> *Seventh, in areas other than the major centres, where pattern bargaining does not occur, there is nothing to suggest that the industry operates either inefficiently or that the working conditions are not to the satisfaction of either the employers or the employees.*[11]

Given the recent case of *Director Fair Work Building Inspectorate v J Hutchinsons Pty Ltd & Ors* referred to earlier, the argument for strong laws and penalties to discourage pattern bargaining and conduct that offends freedom of discrimination is as compelling in 2016 as it was in 2003.

4. ABC FACTCHECKER DEBUNKS UNIONS CLAIMS

HIA notes that in April 2016, the Australian Broadcasting Corporation (ABC) fact checking website researched certain false claims being made by CFMEU about the Bills including that "building workers have less rights than ice dealers under ABCC laws".

The Fact checking was in specific response to advertisements the CFMEU ran prior to the April vote on television and online, depicting an "ice dealer" and a "worker" being interrogated in a darkened room claiming "If Malcolm Turnbull gets his way, a worker will have less rights than an ice dealer", pointing to the "right to remain silent" and the "right to a lawyer of your choice".

The ABC website, in response, states:

The CFMEU's claim is nonsense. The union is conflating two very different concepts. Questioning of an ice dealer is a step in the criminal justice process, and answers to the questions may lead to a conviction and jail sentence for that person. A person examined by the ABCC is providing information as a witness to a civil investigation. They are given at least 14 days notice and have their expenses paid. Nothing they say can be used against them in subsequent proceedings. A building worker suspected of committing a criminal offence has the same rights when interviewed by the police as an ice dealer would have.

The website further adds:

"Nothing new

Compelling people to answer questions or provide documents is not new, and will continue to happen even if Mr Turnbull does not "get his way".

The potential for self-incrimination cannot be used as an excuse under existing workplace law, including:

- *Examination notices under the Fair Work (Building Industry) Act 2012*
- *Production of records to a Fair Work Inspector under the Fair Work Act 2009*

[11] See Royal Commission into the Building and Construction Industry, Final Report of the Royal Commission into the Building and Construction Industry, Vol 5, AGPS, Canberra, 2003, at pg 53.

- *Providing information and answering questions to a General Manager under the Fair Work (Registered Organisations) Act 2009".*[12]

CONCLUSION

The serious body of evidence presented before the 2015 Heydon Royal Commission, the 2002 Cole Royal Commission and the number of cases currently before the Fair Work Commission and Federal Court demonstrates the need for the restoration of the ABCC.

A number of other factors will, of course, also be necessary to drive long term cultural change to certain industrial relations practices in the industry.

But the enhancement of the current building industry specific laws will, at the least, help prevent much illegal conduct from occurring in the future and also sends a message to wrongdoers that much of what is occurring is simply unacceptable in a modern workplace.

[12] See http://mobile.abc.net.au/news/2016-04-27/will-building-workers-have-less-rights-than-ice-dealers-abcc/7340868

"A"

HOUSING INDUSTRY ASSOCIATION

Submission to the
Senate Education and Employment Legislation Committee

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

19 February 2016

HOUSING INDUSTRY ASSOCIATION

contents

Housing Industry Association contact:

David Humphrey
Senior Executive Director
Business, Compliance & Contracting
Housing Industry Association
79 Constitution Ave,
Campbell ACT 2612
Phone: 02 6245 1300

ABOUT THE HOUSING INDUSTRY ASSOCIATION

The Housing Industry Association (HIA) is Australia's only national industry association representing the interests of the residential building industry, including new home builders, renovators, trade contractors, land developers, related building professionals, and suppliers and manufacturers of building products.

As the voice of the industry, HIA represents some 40,000 member businesses throughout Australia. The residential building industry includes land development, detached home construction, home renovations, low/medium-density housing, high-rise apartment buildings and building product manufacturing.

HIA members comprise a diversity of residential builders, including the Housing 100 volume builders, small to medium builders and renovators, residential developers, trade contractors, major building product manufacturers and suppliers and consultants to the industry. HIA members construct over 85 per cent of the nation's new housing stock.

HIA exists to service the businesses it represents, lobby for the best possible business environment for the building industry and to encourage a responsible and quality driven, affordable residential building development industry. HIA's mission is to:

> *"promote policies and provide services which enhance our members' business practices, products and profitability, consistent with the highest standards of professional and commercial conduct."*

The residential building industry is one of Australia's most dynamic, innovative and efficient service industries and is a key driver of the Australian economy. The residential building industry has a wide reach into manufacturing, supply, and retail sectors.

The aggregate residential industry contribution to the Australian economy is over $150 billion per annum, with over one million employees in building and construction, tens of thousands of small businesses, and over 200,000 sub-contractors reliant on the industry for their livelihood.

HIA develops and advocates policy on behalf of members to further advance new home building and renovating, enabling members to provide affordable and appropriate housing to the growing Australian population. New policy is generated through a grassroots process that starts with local and regional member committees before progressing to the Association's National Policy Congress by which time it has passed through almost 1,000 sets of hands.

Policy development is supported by an ongoing process of collecting and analysing data, forecasting, and providing industry data and insights for members, the general public and on a contract basis.

The Association operates offices in 23 centres around the nation providing a wide range of advocacy and business support.

1. EXECUTIVE SUMMARY

On 4 February 2016, the Senate referred the *Building and Construction Industry (Improving Productivity) Bill 2013 [No. 2]* (**Bill**) and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [No. 2]* (**Transitional Bill**) to the Education and Employment Legislation Committee for further consideration.

HIA welcomes the opportunity to make submissions to this inquiry.

HIA supports both Bills and the Federal Government's long standing commitment to re-establish the Australian Building and Construction Commission (**ABCC**).

Background

HIA acknowledges that there are competing views on the Government's policy, hence the fact that the previous (but identical) versions of the two Bills failed to pass the Senate. HIA encourages those Senators who previously voted against these Bills to reconsider their opposition.

HIA does note that both Bills have already undergone significant parliamentary scrutiny and the competing views of employers and unions are generally well known.

In November 2013, HIA responded to an inquiry of this Committee into the *Building and Construction Industry (Improving Productivity) Bill 2013* and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013*, which were in the same form as those introduced on 2 February 2016. Also in January 2014, HIA responded to a further inquiry of this Committee into the Government's approach and policy to re-establish the ABCC.

Prior to this in September 2009 and February 2012, the Senate Education and Employment Committee also inquired into the former Government's Bills to abolish the ABCC and replace it with Fair Work Building & Construction (**FWBC**)

HIA repeats and relies on these earlier submissions.

HIA also refers the Committee to the findings and reports of the Heydon Royal Commission into Trade Union Corruption (**Heydon Royal Commission**). Commissioner Heydon's voluminous final report was released on 30 December 2015. The Heydon Royal Commission is the second such Royal Commission conducted at a Commonwealth level in the past 15 years and follows the Cole Royal Commission into the Building and Construction industry which concluded in 2003.

Commissioner Heydon's interim and final reports detailed much of the same illegal conduct in the commercial construction industry observed by Commissioner Cole more than a decade ago.

According to Commissioner Heydon:

> *'Unless and until there is a strong regulator enforcing legislation that actually deters people from repeatedly breaking the law, the culture in the industry will not change. The current laws have simply been insufficient.'*

Whilst HIA supports the work that Mr Nigel Hadgkiss has done as Director of FWBC, the current legislative framework means that this agency is not as strong, independent or robust as its predecessor.

Arguably, and in many respects, because the *Fair Work Act 2009* enhanced the bargaining rights of unions and removed previous restrictions on prohibited content that were included in the Workplace

Relations Act 1996 (such as restrictions on terms that purported to interfere with the engagement of independent contractors), in abolishing the ABCC and removing the construction industry-specific prohibitions on unlawful industrial action, coercion and discrimination the industry is worse, then before the Cole Royal Commission.

The balance of HIA's submissions in support of the Bills deal with the following matters:

- A snapshot of the residential construction industry and its relationship with the commercial building sector.
- A general comment on the need for a separate industry specific regulator.
- Specific comments on the *Building and Construction Industry (Improving Productivity) Bill 2013 [No. 2]*.
- Specific comments on the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [No. 2]*.

2. THE RESIDENTIAL CONSTRUCTION INDUSTRY

Although the current and proposed definition of "building work" in the Bill only applies to the construction of 5 single dwelling houses or more, many HIA members work across both the commercial, public works and housing sectors. These include builders and developers of multi-unit apartments, mixed-use buildings and public housing sites. Additionally many HIA trade contractors work for both commercial and residential builders.

Historically, the low-rise detached/ cottage construction sector of the residential building industry has not been a source of illegal industrial disputation to the extent suffered by the civil and commercial construction sectors. This is in part due to the engagement of specialist contractors by builders rather than employees, the relatively small scale of construction for single, detached dwellings, the relatively short construction phase, and the low union membership across the industry.

However for infill/medium and high density residential developments, construction costs represent the largest component of overall costs by a considerable margin. Costs are much less elastic than on residential projects.

These types of industrial relations matters typically drive up commercial construction costs:

- days lost because of industrial action;
- abuse of OH&S issues for industrial purposes;
- inflexible inclement weather procedures;
- less working days per annum because of RDO provisions; and
- cost stemming from pattern bargaining (no ticket, no start).

Home building firms which operate in both low and medium/high-rise housing typically are forced to establish two divisions: One based on subcontracting for their detached housing construction, and for the medium/high rise sector, EBA employees or if subcontractors are permitted by the unions, a rate schedule has to be adhered to and other commercial site conditions.

3. THE NEED FOR A SEPARATE INDUSTRY SPECIFIC REGULATOR

HIA understands there are suggestions that rather than restoring the ABCC, instead a "general corruption watchdog" should be established.

HIA does not agree with this view.

The findings and serious body of evidence presented before the Heydon Royal Commission, the 2002 Cole Royal Commission and the number of cases currently before the Fair Work Commission and Federal Court demonstrate the need for building industry specific laws.

To quote Commissioner Heydon:

> *'the argument that there is no need for an industry specific regulator cannot be sustained.'*[1]

As identified in its final report the *'systemic corruption and unlawful conduct'*[2] of the CFMEU is not new; over the last 40 years a number Royal Commissions have reported the same.

There is, according to Commission Heydon:

> *'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 the CFMEU officials habitually show contempt for the rule of law.'*[3]

As at August 2015, FWBC had 52 cases before the courts across Australia.

According to FWBC this figure means that there were more matters in litigation than FWBC, or its predecessor agencies - the Building Industry Taskforce (BIT) and the ABCC ever had before the courts at any one time.

Of the 52 cases in court, six have employers named as respondents and eight matters involve employees. The majority however, some 46 of the 52 cases (88 per cent) have the CFMEU and/or CFMEU officials named as respondents. According to the FWBC website, 69 CFMEU representatives are either before the courts, the Fair Work Commission, or both.

Of the 52 cases before the courts, the majority relate to alleged coercion, unlawful industrial action and right of entry breaches.

In a recent Federal Court judgment, Justice Tracey referred to the union's 'propensity to deliberately flout industrial legislation which proscribes coercive conduct':

> *'[The cases] bespeak a deplorable attitude, on the part of the CFMEU, to its legal obligations and the statutory processes which govern relations between unions and employers in this country.'*[4]

---

[1] Chapter 8 at paragraph 97
[2] Chapter 8 at paragraph 1
[3] Chapter 8 at paragraph 23
[4] See *Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1213 (11 November 2015)

Whilst the Heydon Royal Commission puts forward a number of recommendations to address such behavior, its cornerstone recommendation is the establishment of a separate, building and construction industry specific regulator.

There are also economy wide productivity gains in reestablishing the ABCC.

According to research by Econtech prepared in 2003[5] for the then Department of Employment and Workplace Relations (DEWR) indicated that the costs of building tasks such as laying a concrete slab, building a brick wall, painting and carpentry work cost an average of 10 per cent more for commercial buildings than domestic residential housing. This difference was mainly attributed to differences in work practices between the commercial and domestic residential building sectors. The 2003 study then went on to model the economy wide benefits of reducing the cost gap through reform to work practices in the commercial building sector.

In 2007 a further report was commissioned by the ABCC which confirmed that the introduction of that agency coupled with other legislative reforms had improved work practices and lifted productivity in the commercial building industry. One measurement of its success was the narrowing of the cost gap between commercial and residential construction.

The Econtech report (now trading as Independent Economics) has been periodically updated including most recently on 26 August 2013 in a report commissioned by Master Builders Australia.[6]

In HIA's submission, the contents of this updated report speak for itself, although there are several salient features of the report:

- During the FWBC era there have been significant losses in productivity. Consumers have been $5.5 billion worse off, with higher construction costs reducing demand for new construction including a 1.1% fall for residential construction.
- Because the building industry specific nature of regulation has been almost completely removed, it is reasonable to expect most or all of the productivity gains achieved during the Taskforce/ABCC era will be lost.
- According to Econtech, consumers will better off by $7.5 billion on an annual basis if the ABCC is reinstated.
- Even though detached housing was not within the jurisdiction of the ABCC, the residential building sector as a whole will still experience a productivity gain of 1.5% if the ABCC is reinstated.

HIA submits that there are clear and legitimate basis for the re-establishment of the ABCC.

HIA addresses specific elements of the Bills below.

[5] Econtech, 2003, *Economic Analysis of the Building and Construction Sector*. Canberra, Econtech.
[6] http://www.masterbuilders.com.au/InformationSheets/kpmg-econtech-economic-analysis.

4. BUILDING AND CONSTRUCTION INDUSTRY (IMPROVING PRODUCTIVITY) BILL 2013 (CTH) [NO 2]

Although HIA supports the legislation as a whole, HIA offers the following comments in support of specific elements of the Bills:

- The *Fair Work (Building Industry) Act 2012* unnecessarily watered down the targeted objectives of the legislation into vague, motherhood language. HIA notes that the objectives of the Bill will be restored to the same terms previously included in the *Building and Construction Industry Improvement Act 2005* (Cth) (**BCIIA**). It is particularly essential that the objects refer to promoting respect for the rule of law.
- The extended definition of "building work" to include off-site prefabrication of made-to-order components for parts of buildings, structures or works, and the transporting or supplying of goods to be used in building work necessarily reflects that in many instances, disruptions in the supply and delivery of building materials through coordinated 'go slows' can have as economically disruptive impact on a building project as onsite disputation. HIA also notes current proposals for a merger of the maritime and construction unions.
- HIA supports the reinstatement of the former ABCC's more unrestricted coercive powers. The coercive powers as outlined in the Bill are broadly similar to the investigatory powers held by other Australian law enforcement agencies, including the Australian Taxation Office, Australian Competition and Consumer Commission and the Australian Securities and Investments Commission. Section 155 of the Workplace Health and Safety Act 2011 (Cth) also gives OHS regulators extensive powers to provide information, produce documents and appear before an inspector to give evidence. Further the Heydon Royal Commission has concluded that *'there is a strong case for the building industry regulator to have information gathering powers that are equal to those of other major statutory regulators*[7] recommending that:

  > *'…legislation be enacted conferring the building and construction industry regulator with compulsory investigatory powers equivalent to those possessed by other civil regulators.'*[8]

- The removal of much unnecessary duplication and red tape associated with the issuing of examination notices, but the retention of oversight by the Commonwealth ombudsman.
- The restoration of industry specific penalties. The current penalties appear to have little deterrent effect on union conduct. Re-introducing stronger penalties will serve as a powerful incentive to adhere to the industrial relations laws.
- HIA notes that an ongoing misunderstanding is that the regulator will interrogate workers without any right to legal representation. The Bill includes an express right to legal representation to a person required to attend before the ABC Commissioner.

[7] Chapter 8 at paragraph 142
[8] See Recommendation 62

- The ability of the ABC Commissioner to delegate his or her compulsory examination functions to a deputy commissioner or SES employee if no deputies have been appointed.
- A reverse onus for unions and employees relying on the health and safety exception for industrial action.
- Making project agreements unenforceable. HIA however recommends that the Bill additionally make project agreements illegal.

3.1 The Building Code

HIA refers to Chapter 3 of the Bill and the power vested with the Minister to issue a Building Code and the ABC Commissioners role in enforcing compliance with that Code.

In HIA's view, the Building Code and the ABCC/FWBC work "hand in glove".

The 2006 Code and Guidelines, although an administrative burden for some members, alongside the ABCC, was responsible for much of the cultural improvements in the industry that occurred prior to the abolition of the ABCC. The Code in effect was a licensing regime for commercial building projects funded by the Commonwealth Government.

HIA submits that the current Building Code is ineffective, because it simply reflects the *Fair Work Act 2009* (Cth) (**FWA**) and the 'watered down' content of the FWBIA. Of specific concern is that the 2013 Code allows participants to agree to rights of entry that are broader than those provided under the FWA and other relevant legislation without breaching the Code.

In November 2014, the Government released the *Fair and Lawful Building Sites Code 2014* (**2014 Code**) which was modeled on the Victorian Code of Practice for the Building and Construction Industry (**Victorian Code**) and developed as a result of the abolition of the ABCC by the Gillard Government.

The passage of the Bills and the application of the 2014 Code is vital to prevent further concerns with the (in)consistency between the Federal Building Code and the Victorian Code as demonstrated in the matter of *Construction, Forestry, Mining and Energy Union v State of Victoria [2013] FCA 445 (17 May 2013);* and *Construction, Forestry, Mining and Energy Union v McCorkell Constructions Pty Ltd (No 2) [2013] FCA 446 (17 May 2013)*. The outcomes in these two cases are of significant concern to the industry.

3.2 Unlawful Action and Industry Specific Provisions

HIA refers to Chapter 5 of the Bill which restores the construction industry offence regime, creating offences for unlawful industrial action and unlawful picketing. HIA supports this chapter.

The construction industry is inherently exposed to pattern bargaining and industrial action over disputed terms, such as those that seek to limit the engagement of independent contractors.

Unfortunately, because of the enhanced bargaining rights and the removal of many of the restrictions on prohibited content that were included in the Workplace Relations Act under the FWA, the FWBIA in removing the construction industry-specific prohibitions on unlawful industrial action, coercion and discrimination left the industry worse, in a regulatory sense, then before the Cole Royal Commission.

HIA supports the new offence for unlawful picketing as outlined in section 47 of the Bill and the imposition of a reverse onus as outlined under section 57 of the Bill which will require individuals to prove they were not motivated by industrial objectives.

Individuals and organisations engaging in unlawful blockades of sites should not be able to hide a so-called "democratic" right to protest when their conduct is motivated to achieve an industrial relations outcome is intended to economically harm the building project to do so.

The large scale pickets of building sites, such as the orchestrated picket the subject of proceedings in *Grocon & Ors v Construction, Forestry, Mining and Energy Union & Ors [2013] VSC 275* do not just have economic impact on the individual building project, the builders and their employees, subcontractors and suppliers. They interfere with and disrupted commuters and citizens in their everyday activities.

Further, HIA supports the provisions of the Bill which enable a person to apply for injunctive relief to restrain a person from organising or engaging in unlawful industrial action that relates to building work and the imposition of penalties to a maximum of $34,000 for individuals and $170,000 for unions for breaches of these provisions. The strong penalties under the BCIIA served as a strong incentive to adhere to the industrial relations laws.

3.3 APPLICATION TO OFFSITE PREFABRICATION AND TRANSPORTATION AND DELIVERY OF BUILDING MATERIALS

It has been HIA's long standing view that offsite work and the building supply chain should be monitored. Delays in the supply and delivery of manufactured components can have as much of an impact on the cost and time it takes to complete a project as onsite delays can.

Accordingly, HIA supports the inclusion of "offsite prefabrication" to the definition of building work in the Bill.

The removal of offsite building work was a significant flaw in the FWBIA. Many contractors involved in the offsite prefabrication of certain building components such as cabinets and window frames will also be involved in the on-site installation of those components.

Further, the extension of the powers of the ABCC to the transportation and delivery of building materials is an important improvement to the BCIIA.

Although the interruption of a concrete pour remains a standard industrial tactic, many illegal industrial disputes affecting construction projects (residential, commercial, industrial) actually happen at the interface between onsite work and the delivery of manufactured products.

For instance, HIA notes that the 2012 injunctions were in relation to the Myer Emporium blockade to stop the union from applying unlawful pressure to Boral Resources, Always Concrete Pumping (Vic) Pty Ltd, ICPS (Melb) Pty Ltd, Fitzgeralds and Speed Pro to cut off cement and concreting supplies to Grocon sites.

In HIA's submission, Boral and other building products suppliers and manufacturers need the protection of a strong regulator from such conduct. The Heydon Royal Commission also identified that such changes are a *'sensible extension'.*[9]

5. BUILDING AND CONSTRUCTION INDUSTRY (CONSEQUENTIAL AND TRANSITIONAL PROVISIONS) BILL 2013 (CTH)

HIA supports the Transitional Bill, specifically provisions which will empower the ABC Commissioner to investigate current and past contraventions of the FWBIA with the full suite of investigation powers as prescribed by the Bill available to it.

Of specific note is Item 20 of Schedule 2 of the Transitional Bill which will enable the ABC Commissioner to re-agitate matters that were settled under section 73 and 73A of the FWBIA. Of note, the Royal Commission in its final report has recommended the repeal of section 73 and 73A of the FWBIA.[10]

The inability of FWBC to prosecute matters once the parties have agreed to settle the matter is a fundamental defect in the FWBIA. It enables parties to continually flout and breach the industrial laws, so long as they secure a "settlement" with the complaining party.

Accordingly, HIA sees this provision of the Transitional Bill as a significant step to reinforcing the deterrent powers of the ABCC while also empowering the ABCC to prosecute past recalcitrant behaviour.

6. CONCLUSION

The serious body of evidence presented before the 2015 Heydon Royal Commission, the 2002 Cole Royal Commission and the number of cases currently before the Fair Work Commission and Federal Court demonstrates the need for the restoration of the ABCC.

A number of other factors will, of course, also be necessary to drive long term cultural change to certain industrial relations practices in the industry.

But the enhancement of the current building industry specific laws will, at the least, help prevent much illegal conduct from occurring in the future and also sends a message to wrongdoers that much of what is occurring is simply unacceptable in a modern workplace.

[9] Chapter 8 at paragraph 112
[10] See Recommendation 65